Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

JOSEPH P. MAYER, III AND ELEANOR C. MAYER,

Petitioners,

v.

TRANSAMERICA TITLE INSURANCE COMPANY (NOW KNOWN AS TRANSNATION TITLE INSURANCE COMPANY) AND COMMONWEALTH LAND TITLE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT CERTIORARI

JOSEPH P. MAYER, III, *In Pro Per*
ELEANOR C. MAYER, *In Pro Per*
1615 Hilts Avenue, Unit #1
Los Angeles, California 90024
(310) 474-5469

Dated: January 14, 2003

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

95 pp

QUESTION PRESENTED

Joseph and Eleanor Mayer were general and limited partners of a California partnership formed in 1983, at a time when California Corporations Code Section 15025 provided that "a partner is a co-owner with the other partners of specific partnership property holding as a tenant in a partnership." A lien claimant obtained a judgment now in excess of $8,000,000 against the partnership and Joseph Mayer as general partner. The partnership's title insurance company had originally provided a "courtesy defense" to the Mayers, but ultimately agreed to defend without a reservation of rights. The insurer purchased the judgment and asserted it against Joseph Mayer only, on the ground that it had insured the entity only and owed no duties to the partners. The Mayers brought suit, but their standing to sue was denied because of a change in California law, which adopted the Uniform Partnership Act in 1996, reciting that a partnership is an entity and that partners now possessed no individual property rights.

1. The question presented is whether a state statute repugnant to the U.S. Constitution's Fourteenth Amendment prohibition against deprivation of a person's property without due process of law is valid particularly in an egregious case where *ex post facto* application by a State Court has caused such unjust judicial result of the partner being liable for the $8,000,000 lien judgment, yet without standing to sue this partnership's title insurer.

This case is a good vehicle to resolve entity versus aggregate theories of partnership (see authorities, *infra*), and could be a useful companion to this Court's *Clackamas Gastroenterology Associates, P.C. v. Deborah Anne Wells*, No. 01-1435, on calendar for oral argument on February 25, 2003. The U.S. Census Bureau estimates that in 1997 some 341,000

employers had chosen the partnership form of legal organization, employing 3,918,000 workers with annual receipts of $523,000,000,000; uniformity in the law of partners and partnerships is universally important for the large number of persons affected.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the denial of the Petition for Review by the California Supreme Court which affirmed the final opinion of the Court of Appeal in the State of California Second District, Division Three, upholding the final judgment in this case.

PARTIES AND PARENTS

In addition to the parties listed in the caption, the parent company of Respondents is LandAmerica Financial Group, Inc. (hereinafter "LFG"). Under Rule 29.6, SEC reports disclose that no other publicly held corporation owns more than 10% of LFG's stock.

OPINIONS BELOW

The denial of the Petition for Review in the Supreme Court of the State of California of this case (California Supreme Court Case No. S109410) is reprinted in the appendix hereto, at p. 1a, *infra*.

The Petition for Review to the Supreme Court of the State of California including the Opinion in (the Court of Appeal in the State of California, Second District Division Three, in this case (Court of Appeal No. B147731) is reprinted in the appendix hereto, at p. 44a, *infra*.

The judgment of the Superior Court of Los Angeles Court (Case No. BC107066) is reprinted in the appendix hereto at p. 73a, *infra*.

JURISDICTION

The Petition for Review in the Supreme Court of California was denied on October 6, 2002. (App. p. 75a).

The jurisdiction of this Court to review the upholding of the final judgment in this case by the highest Court of California in which a decision could be had is invoked under Title 28 of the United States Code, Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Article 1, Section 9, Clause 3:

"No Bill of Attainder or *ex post facto* law shall be passed."

Amendment XIV to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United State and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Mayers were sued in the Driver action not only as partners, but also as co-owners of the partnership's property. TransAmerica then provided them a defense from October 1990 to November 1993 and advised Joseph Mayer, in response to his expressed concern about a conflict of interest, that the defense was being provided without a reservation of rights. But when the Mayers would not sign a release absolving TransAmerica of any claim for bad faith, TransAmerica turned on its insureds, cut off funding for the Mayers' counsel in both cases, and — almost unbelievably — paid opposing counsel to oppose the Mayers at both the trial and appellate levels, and — even more so — purchased the judgment ultimately obtained against them.

Joseph Mayer was sued as a partner and property owner

In the Driver action, Joseph Mayer was sued in his capacity as a general partner of HBAL and as owner of an interest in the real property; ultimately an arbitration award and judgment were entered against him *in his capacity as partner.* When the Driver mechanics' liens were filed in October 1985 and March 19, 1986, Corporations Code Section 15025 provided, "A partner is a co-owner with the other partners of specific partnership property holding as a tenant in partnership." Although Corporations Code Section 15025 was abrogated by the enactment of the Uniform Partnership Act of 1996, all relevant circumstances, including the filing of suit in this action, occurred prior to that change.

The law during that period confirmed that a partnership could properly be considered an "entity" only for procedural purposes and that for all other

purposes, including ownership interests, a partnership is considered to be an aggregate of individuals." As noted in 9 Witkin, Cal. Summary, *Partnership*, section 15:

> Whether a partnership is a distinct legal person or entity or merely a group of individuals is a question which sometimes has important implications. The Partnership Act, in the main, follows the aggregate or common law theory. (See Com. Note, 6 U.P.A (Master Ld), p. 6, *Reed v. Industrial Ass. Com.*, 10 C.2d 191, 192, 71 P.2d 1212 (1937) ["Occasional suggestions of this entity theory of partnership are found in statutes or decision, but apart from exceptional situations, a partnership is not considered an entity, but an association of individuals"] ... (Emphasis added.))

Other California authorities firmly establish that, under the law as it existed in and before 1995, a partnership is not an entity and the individual partners have individual rights with respect to the partnership property. As discussed in *Rudnick v. Delfino*, 140 Cal.App.2d 260, 266 (1956), "partnership in the eyes of the law is not a legal entity even though it may be sued under the firm name, by reason of the provisions of section 388 of the Code of Civil Procedure." On the basis of that same reasoning, the Court in *Riddle v. Lushing*, 203 Cal.App.2d 831, 836 (1962), held that the individual partners were protected by California's anti-deficiency legislation despite the fact that the partnership property was held in the partnership's name and the partners signed individual guarantees. Essentially, the Court held that the partners' individual guarantees did not abrogate application of the anti-deficiency legislation

because the partners were, in fact, the true owners of the property through the partnership:

> The partnership, Midland Investment Co., is not a legal entity, and the defendants, as the only partners therein, were the purchasers of the property, and they were jointly liable for the balance of the purchase price. "Any estate in real property may be acquired in the partnership name." (Corp. Code Section 15008, subd. (3).) Defendants, as the only partners, acquired title by the deed (in the partnership's name) as co-owners, holding as tenants in partnership. (See Corp. Code Section 15025, subd. (1), *supra.*) It is conceded that the note and trust deed were given as part of the purchase price of the property. The Court could find, under the evidence, that the note, trust deed, and guarantee were parts of one transaction. Under the circumstances here, the signing of the guarantee did not change the nature of the transaction and render section 580b inapplicable to defendants. The Court did not err in determining that judgment for plaintiff is barred by said section 580b. (*Ibid.*)

Moreover, as the Court in *United Savings and Loan Association of California v. Hoffman*, 30 Cal.App.3d 306, 312 (1973), noted in awarding surplus receivership funds to the individual partners where the partnership was a successor beneficiary in a trust deed transaction, "partnerships for several years in this state have been permitted to sue in both their assumed and known names."

Thus, under the law as it existed at the time of the events relevant to this action, a general partner of a limited partnership was part of an aggregate of individuals who had individual interests in the ownership of the partnership property.[1] Although the Partnership Act in effect at that time still limited the actions a partner could take with respect to the sale or transfer of the partnership property (Corp. Code Section 15025), the statutory reality is that the partners remained co-owners.

In an analogous context, the United States Supreme Court recently held that co-owners in a tenancy by entirety, i.e., ownership of property by a husband and wife, held separate, individual interests in that property, thereby overruling the district Court's conclusion under state law that tenancy by the entirety constituted ownership by an entity which precluded the existence of individual interests in the property *United States v. Craft*, 122 S.Ct. 1414 (2002).

Like tenancy by the entirety, tenancy in partnership creates separate interests in the property itself, although the exercise of power over those separate interests may well be limited. But the fact remains that, under the law as it existed at the time

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[1] The Appellate Court's reliance in this case and in *Mayer v. C.W. Driver*, 98 Cal.App.4th 48 (2000) on *Tinseltown Video, Inc. v. Transpiration Ins. Co.*, 61 Cal.App.4th 184, 197-200 (1998) and *Bartlome v. State Farm Fire and Casualty Ins. Co.*, 208 Cal.App.3d 1235, 1239-1242 (1989) to the effect that the individual partners in a partnership have no right to sue for injury to the partnership property is misplaced. First, *Tinseltown*, an insurance coverage case dealt with the right of the partners to sue a third party for interference with the right of possession of the partnership property, not actual damage to it. Second, *Bartlome* also an insurance coverage case dealt with the converse question, i.e., did an insurance policy issued to a partner cover property owned by the partnership. Neither case deals with the issue here: Whether, under the law as it existed in and before 1995, a partner has standing to sue for injury to the partnership property.

in question, the ownership of those property interests properly establishes standing to sue by the general partner with respect to damage or injury to those individual partnership interests in the property. (*Gantman v. United Pac. Ins. Co.*, 232 Cal.App.3d 1560, 1566 (1991) [person who owns or holds title to the claim or property involved, as opposed to others who may be interested or benefited by the litigation, has standing to sue.].)

Given that the UPA of 1996 specifically provides that it does not apply to rights accrued prior to its effective date (Corp. Code Section 16112), Mayer, as a general partner, had a property interest in the partnership property in December 1985 (when the lien foreclosure action was filed) and on March 12, 1986 (when the TransAmerica title policy was issued).

The law, during the time at issue, provides that an insurance policy insuring a partnership also insures the partners for their acts done in the usual course of partnership business. In *Milazo v. Gulf Ins. Co.*, the California second appellate district held that when a partnership is the named insured, a partner qualifies as an insured with respect to his liability as a partner."[2]

There is completely independent ground for the Mayers' standing as insureds, as the Mayers were part owners of the insured policy:

> No person may recover on a policy of insurance unless that person has an insurable interest in the property insured. Insurable interest is defined as: "Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a

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[2] *Milazo v. Gulf Ins. Co.*, 224 Cal.App.3d 1528 (1990).

> contemplated peril might directly damnify the insured ..." (Ins. Code Section 281.) Simply phrased, an insurable interest exists when "the insured has a direct pecuniary interest in the preservation of the property and ... will suffer a pecuniary loss as an immediate and proximate result of this destruction." (*California Food Service Corp. v. Great American Insurance Co.*, 130 Cal.App.3d 897 (1982).)

Moreover, when TransAmerica promised to defend the partnership in the Cases Agreement, it necessarily insured all the partners, including the Mayers. The lien claimant sued the Mayers in their capacity as partners of the partnership, as owners of partial interest in the insured real property, as agents and alter egos of the partnership, and as guarantors of the partnership liabilities.

In *Goss v. Security Ins. Co.*, 113 Cal.App. 577, 579 (1931), an automobile accident policy insuring "Pacific Motor Company" was held to cover the liability of the three partners. (*Id.*)

Additional California authority supports the rule that partners are covered by insurance policies for the partnership whenever the partners' acts are done in the usual course of partnership business.

In California, "insurance on a joint venture covers liability of the individual partners or joint ventures." *Quetnick v. McConnell*, 154 Cal.App.2d 112, 119 (1975) (citing *Reed v Industrial Acc. Comm.*, 10 Cal.2d 191 (1937)); *Goss v. Security Ins. Co. supra.*

In *Ticor Title Insurance Co. of California v. American Resources, Ltd.*, 859 F.2d 772 (1988), the U.S. Court of Appeals for the Ninth Circuit, decided

that Hawaii would follow California law in holding that a party to a joint venture is covered under a title insurance policy obtained by the joint venture thereby negating the insurer's argument that the joint venture was the policy's only named insured. The *Ticor* Court cited to the California precedents of *Quetnick, Reed, and Goss, supra.* (*Ticor, supra*, 859 F.2d 772, 774.)

The reasoning of all of the above cases applies to title insurance because in *Lambert v. Commonwealth Land Title Insurance Co.*, 53 Cal.3d 1072 (1991), the California Supreme Court explicitly held:

> **The duty to defend in a title insurance case is governed by the same principles which govern the duty to defend under general liability policies.** [Citations omitted.] The duty commences upon tender of the defense, and continues until the underlying lawsuit is concluded. [Citation omitted.] *Lambert, supra*, 53 Cal.3d at 1077, emphasis added; see also Appleman, 9 *Insurance Law & Practice* Section 5215.

Moreover, TransAmerica waived any right to contest coverage. California law directs, "The carrier may accept defense of the lawsuit without raising any objection to coverage. [But] by doing so, the insurer waives its right to contest coverage at a later date.[3]

In numerous letters, agents and representatives of TransAmerica, Vice President Davida Tussman and attorney Joseph Giden, unmistakably communi-

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[3] See *Truck Ins. Exchange v. Superior Court*, 51 Cal.App.4th 985, 993 (1980), citing to *Miller v. Elite Ins. Co.*, 100 Cal.App.3d 739 (1980); see also *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 46 Cal.App.4th 18010 (1996).

cated to Joseph Mayer that TransAmerica Title Insurance Company was defending the partnership and the individual partners — the Mayers — in the Driver action **without reservation of rights**.

Since Joseph Mayer was sued in the lien foreclosure action in his capacity as a general partner, he was covered under the TransAmerica title insurance policy to the extent of his liability as a partner[4] — which here was for the entire amount of the Driver judgment. Since Mayer was covered under the policy, TransAmerica owed him not just a duty to defend, but also a duty to indemnify. Consequently, Mayer had standing to sue TransAmerica.

The question presented was raised in the Petition for Review (App. pp. 12a-18a); in the appellate proceeding (App. p. 2a, paragraph 1, p. 7a; paragraph 3, p. 13a; paragraph 2, p. 15a, paragraph 1; p. 16a, paragraph 4; p. 19a, paragraph 3; p. 20a, paragraph 1; p. 22a, lines 16-19; p. 24a, paragraph 1; p. 26a, paragraph 3.

Thus, it is important to the stability of partnership interests in California and all other states that this issue be addressed and the California Court's erroneous abrogation of partnership rights be corrected.

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[4] See *Milazo v. Gulf Ins.*, 224 Cal.App.3d 1528, 1537-1538 (1991); see also *Ticor Title Insurance Co. of Calif. v. American Resources, Ltd.*, 859 F.2d 772, 774 (1988); *Quetnick v. McConnell*, 154 Cal.App.2d 112, 119 (1937); *Reed v. Industrial Acc. Comm.*, 10 Cal.2d 191, 192 (1937).

REASONS FOR GRANTING THE PETITION

I. THIS COURT PRESENTLY HAS UNDER CONSIDERATION A RELATED CASE.

The subject matter of this petition is analogous to the subject matter of a petition which the Court recently granted in *Clackamas Gastroentereology Associates P.C., Petitioner, v. Deborah Anne Wells, Respondent*, No. 01-1435, set for oral argument on February 25, 2003. That matter involved a conflict between several different federal circuits with respect to whether a professional corporation is a "covered entity" for the purposes application of Americans with Disabilities Act (42 U.S.C. 12112(a)). Petitioner in that matter argued that shareholders of a small corporation were like partners rather than employees, and therefore the ADA was not applicable. Petitioners in the instant case submits that the same analogy is applicable in their case, namely that partners of a partnership are individuals with all the inherent rights thereof, and not merely a part of a partnership without individual rights.

II. THE QUESTION PRESENTED IS IMPORTANT.

As set forth above, the adoption by California, among other states, of the Uniform Partnership Act substantially changed what should have been vested rights of partners with respect to their position in a partnership. The application of that Uniform Partnership Act changed the status and position of partners such that they lost valuable property rights as individuals which became absorbed into the partnership and which could, and in the instant case did, result in severe deprivation of valuable rights previously held by the individual partners.

Otherwise, the oppressive use of power by managing partners could result, and in the instant case has resulted in an abuse of that power to the severe detriment of the individual partners.

III. THE DECISION OF THE CALIFORNIA COURTS IS ERRONEOUS.

The California Courts have failed to accept and recognize the impact of the change in the status of partners as a result of the enactment of the Uniform Partnership Act in California as well as many other states.

CONCLUSION

This Petition for Writ of Certiorari should be granted for all the above reasons. In the alternative, if five Justices agree, the final judgment of the California State Court should be summarily reversed without briefing or argument.

Respectfully submitted,

JOSEPH P. MAYER, III, *In Pro Per*
ELEANOR C. MAYER, *In Pro Per*
1615 Hilts Avenue, Unit #1
Los Angeles, California 90024
(310) 474-5469

Dated: January 14, 2003

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APPENDIX A

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JOSEPH P. MAYER III et al.,

Plaintiffs and Appellants,

vs.

TRANSNATION TITLE INSURANCE COMPANY,

Defendant and Respondent.

S_____
2nd Civil No. B147731

(Los Angeles County Superior Court Case No. BC107066))

After a Decision by the Court of Appeal,
Second Appellate District, Division Three
Case No. B147731

PETITION FOR REVIEW

John A. Girardi, #54917
Girardi Keese
1126 Wilshire Blvd.
Los Angeles, CA 90017
(213) 977-0211
Attorneys for Petitioners Appellants, and Plaintiffs

Michael J. Bidart #60582
Douglas M. Carasso
#151046
Shernoff Bidart & Darras
600 S. Indian Hill Blvd.
Claremont, CA 91711
(909) 621-4935
(909) 625-6915 FAX
Attorneys for Petitioners, Appellants and Plaintiffs

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PETITION FOR REVIEW

ISSUES PRESENTED

1. When a California partner is sued in that capacity and as a co-owner of partnership property, and the partnership's title insurer provides a defense for a time to that partner, does the partner thereafter have standing to sue the insurer for its bad-faith conduct in handling the defense?

2. After an insurer's duty to defend is established immediately upon the existence of a possibility of coverage, may the defense thereafter be deemed not to have been owed in the first place, based on subsequent appellate-court decisions?

WHY REVIEW SHOULD BE GRANTED

The need to maintain uniformity of decisions in this state requires review of the appellate court decision in this case, which opinion directly conflicts with established statutory and case-law authority on the issues presented. The appellate court's holding that partners sued in that capacity and as co-owners of the partnership's property, particularly after they are provided a defense by their insurer for a time in a civil action, do not have standing to sue the insurer for its bad-faith handling of their defense (Opinion, pp. 20, 25-28) conflicts directly with California law providing that an insurer that voluntarily provides a "courtesy defense" to an allegedly uninsured party assumes the duty to defend the uninsured party as if he were in fact its insured under the same covenant of good faith and fair dealing, which includes the duty to appoint independent counsel when the insurer and the party have conflicting interests. (*Mosier v. Southern California Physicians Insurance Exchange* (1998) 63 Cal.App.4th 1022, 1043.) Moreover, accepting a defense without reservation of rights bars an insurer from later denying coverage. (*Truck Ins.*

Exchange v. Superior Court (1996) 51 Cal.App.4th 985, 993, citing to *Miller v. Elite Ins. Co.* (1980) 100 Cal.App.3d 739; see also *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810.) Further, "[t]he duty to defend in a title insurance case is governed by the same principles which govern the duty to defend under general liability polices." (*Lambert v. Commonwealth Land Title Insurance Co.* (1991) 53 Cal.3d 1072, 1077.)

Because the appellate court's decision creates a substantial conflict in the law with respect to this extremely important issue, which potentially has a significant economic impact in this State, review and clarification are needed.

Second, the second-appellate district essentially held that since appellate decisions in other cases involving the Mayers – reached after the duty to defend was triggered and after the Mayers' own insurer had paid other lawyers to oppose the Mayers in those cases – determined that *ex post facto* they ultimately had no standing in related actions, except through their "irrevocably" appointed agent, against other parties, the Mayers were suddenly not owed a duty to defend in those cases by Transamerica 12 years earlier. (Opinion, pp. 26-28.) That holding is in direct conflict with this Court's decision in *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295 and 301, that the duty to defend exists immediately upon tender and cannot be denied by facts or events arising thereafter. Given that this decision directly conflicts with this Court's prior decision, the need for statewide uniformity on this issue necessitates review.

SUMMARY OF FACTS AND PROCEEDINGS

A. The partnership is formed and purchases property

Huntington Breakers Apartments, Ltd. ("HBAL") was formed in March 1983 as a California limited partnership with the goal of developing a large piece of land in Huntington Beach, California into an apartment complex for investment purposes. (Appellants' Appendix In Lieu of Clerk's Transcript ("App."), at 336.)

On its date of formation, HBAL purchased a parcel of vacant land in Huntington Beach; and five friends took title: Joseph and Eleanor Mayer, Rose Marie Semingson, and Daniel Young as individual tenants in partnership, and Steven Semingson through his ownership with Young of Wilmore City Development, Inc. ("Wilmore"). (App., at 336-337.) The general managing partners of HBAL under the original agreement were petitioner Joseph Mayer and Wilmore; and Eleanor Mayer was a limited partner. (App., at 336.)

In accordance with Corporations Code § 15025 (then in existence), as well as the original partnership agreement, although real property was generally to be held in the name of the partnership, the partners were authorized to hold partnership property in the name of one or more of the partners or their nominees. (App., at 278-280.)

B. Driver's contracts and mechanics' liens

In April and May 1984, prior to any change in the partnership agreements, HBAL, Mayer, and Wilmore entered into a construction contract with C.W. Driver as the general contractor. (App., at 203-204, 338.) Before completing the project, Driver walked off the job, claiming he had not been paid

under the terms of the agreement. (App., at 339, ¶ 20.)] On October 3, 1985 and March 19, 1986, Driver filed mechanics' liens against the property - both of which *identified Joseph Mayer, individually, as one of the "owners" of the property*. (App., at 495.)

C. Driver's complaint and resulting cross-complaint

In December 1985, Driver filed a complaint against the Mayers and the other partners for foreclosure of its mechanics' liens and to compel arbitration under the construction contract for the balance allegedly due for the construction, entitled C.W. Driver v. Huntington Breakers Apartments, Ltd., et al., Orange County Case No. 477394 ("the Driver action"). (App., at 407.) The complaint named both Mayers as defendants and specifically alleged that they were "*the owners* or reputed owners" of the property. (App., at 409, ¶ 7.) In response, HBAL, both Mayers, and the other partners cross-complained against Driver for deficiencies and inadequacies in his work. (App., at 455.)

D. Transamerica policy sold to partners

On March 12, 1986, Transamerica Title Insurance Company ("Transamerica") sold the Mayers and their partners a title insurance policy in the amount of $30 million. (App., at 486, 485-500.) When the policy was issued, in exchange for a premium payment of $38,902.50 from the Mayers and their partners, Transamerica promised that it would protect the Mayers and the other partners of the named insured, HBAL, from loss or damage incurred by Driver's mechanics' liens, asserted against the Huntington Breakers' property and their interests as owners. (App., at 370, ¶ 158.)

Pacific Federal Savings Bank ("Pac Fed") wanted to be insulated from Driver's mechanics' liens, and

that is why HBAL purchased the title insurance policy from Transamerica, which made Transamerica responsible for removing the mechanics' liens. (App., at 137.) In issuing the policy, however, Transamerica required that original HBAL partners Mayer, Semingson, and Young agree to indemnify Transamerica from any mechanic's lien claims. (App., at 137.)

Transamerica admitted that it intended to provide title insurance over the Driver action to a new partner in Huntington Breakers Apartments, Ltd. ("HBA"), Pac Fed, and/or its affiliates. (App., at 137.) After Driver sued Pac Fed's affiliate, Pacifica Real Property Investments Corporation, Transamerica stated that it intended to insure Pacific Savings Bank, a partner of HBA. (App., at 137.)

Paragraph 3(a) of the Conditions and Stipulations of the Transamerica policy provides:

> The Company [Transamerica], at its own cost and without undue delay, shall provide for the defense of an insured in all litigation consisting of actions . . . commenced against such insured, or a defense interposed against an insured in an action to enforce a contract for sale of the estate or interest in said land, to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy. (App., at 362, ¶ 129; 486.)

At a minimum, this coverage required Transamerica, from March 12, 1986, to provide the partners a legal defense against the Driver action. (App., at 360, ¶ 130; 678, ¶ 103.)

E. Arbitration of the Driver action

The court ordered the Driver action to arbitration as to HBAL, the Mayers, and Wilmore on the contract issues. On October 4, 1990, the arbitrators in the Driver action entered an award in favor of Driver. (App., at 200, 460.)

F. By the Cases Agreement, Transamerica promised to provide counsel for the Mayers

On August 11, 1991, Transamerica induced the Mayers to enter into the Huntington Breakers Cases Agreement, which replaced the Indemnity Agreement as a material part of the $30 million insurance policy that Transamerica had issued to the Mayers and HBAL. (App., at 365, ¶ 141.) Under the terms of the Cases Agreement, Transamerica explicitly promised to continue to pay all attorneys' fees, costs, and expenses, at least up to $1,500,000, to defeat the mechanics' liens asserted in the Driver action. (App., at 365-366, ¶ 142.) Transamerica agreed to pay all costs and attorneys' fees incurred in the prosecution of the cross-complaint against Driver and others, the surety bad faith action, and the Allen, Matkins malpractice action. (App., at 365-366, ¶ 142.) Transamerica further promised to provide competent and independent legal counsel to remove the defects of the mechanics' liens on the property (App., at 370-371, ¶ 159.), as well as to "act reasonably in arriving at decisions to successfully prosecute and settle the cases as necessary." (App., at 366, ¶ 143.)

G. Transamerica seizes on conflicts among partners

But when a conflict arose among the partners during the course of the underlying litigation, Transamerica did not provide independent counsel to

the Mayers or agree to settle the Driver action and the legal malpractice action in the best interests of the Mayers -- unless the Mayers would accept Transamerica's unconscionable demand that they sign a waiver of any bad-faith action against Transamerica. (App., at 515, ¶ 6.)

Transamerica has paid legal counsel to oppose the post-judgment motions and appeals of the Mayers, whom it had previously undertaken to defend. (App., at 358, ¶ 109; 368.)

Transamerica also knowingly made promises to the Mayers by its explicit extension of a defense without a reservation of rights; or (as it put it in other instances) a "courtesy defense." (App., at 371, ¶ 160.) Transamerica promised in the policy, the Cases Agreement, and by oral and written representations, that it would protect the Mayers against loss or damage incurred by reason of any defect in the title to the subject property, that any defect in the title to the property would be removed, and that Transamerica would provide competent and independent legal counsel to assist the Mayers in the defense of any claim asserted against the property set forth in the policy. (App., at 371, ¶ 161.)

H. Transamerica impedes Mayers' settlement discussions with Driver

Before the hearing on the Petition to Confirm the Arbitration Award (in the Driver action), Mayer entered into settlement negotiations with C. W. Driver; the two had tentatively agreed to a possible settlement and to a meeting with independent counsel present. (App., at 373, ¶ 171.) Mayer informed his partners about the settlement negotiations. When counsel for Transamerica, Joseph Giden, learned about Mayer's proposed meeting with Driver, he demanded that he be present on its behalf. (App., at 373, ¶ 172.) Despite Mayer's objection that Giden's presence would jeopardize favorable settlement, Giden insisted upon

attending the settlement meeting and did so for the purpose of disrupting the negotiations and in order to intervene on behalf of, and solely for the interests of, Transamerica. (App., at 373, ¶ 172.) Giden's participation in the meetings scuttled the favorable settlement to which Mayer and C. W. Driver had tentatively agreed. (App., at 373, ¶ 173.)

I. Transamerica denies conflict of interest and defends the Mayers

On February 25, 1992, Mayer wrote to Davida Tussman (Vice President, Senior Claims Counsel for Transamerica) ("Tussman") and described what he believed to be a "genuine conflict of interest" between his and the insurer's interests; he reminded her that she had, the prior month, received a presentation on the cross-complaint from the experts of the Mayers' selected counsel, George Coleman, which experts "have assessed the reasonably foreseeable damages attendant to Driver's breach coincidentally at $19.5 (sic)". Mayer chastised her for her "slow-paying or no-paying" of cross-complainants' experts and told her that "A 'walk-away' is totally unacceptable to your insureds if the lien gets expunged..."

On March 9, 1992, Mayer faxed to Tussman a letter attached to which was a Federal case, *Certain Underwriters at Lloyd's v Pacific Southwest Airlines et al.*, 92 Daily Journal D.A.R. 2999, 3002; and in that letter he said:

> In a recent [February 26, 1992] District Court case in the Central District, Judge William Rea held that: "When an insurer is aware of a conflict of interest between it and the insured, the insurer has an affirmative obligation to advise the insured that the insured has the right to obtain independent counsel to represent the insured's interests in defense of any

> lawsuit. In that case, 'the only action taken by Lloyd's was to notify USAIR that a potential conflict existed..." However, the Court said that '...Lloyd's breached its duty in failing to fully inform USAIR of the possible conflicts of interest." I have written to you of the potential prejudice that has been possibly caused, in our attempt to properly defend the mechanic's lien lawsuit and related cross-actions, by a conflict of interest between Transamerica and its insureds. As you observed in your conference room, our foreseeable damages from Driver exceed $19,000,000.You also stated that you had a conflict. Please fully inform me of any and all possible conflicts of interest. Thank you.

On March 13, 1992, Tussman wrote back to Mayer on Transamerica Title Insurance Company letterhead and, on Transamerica's behalf, stated as follows:

> Dear Joe: In response to your various fax notes to me and as a follow-up to our subsequent conversations, please be advised as follows:
>
> 1. *Transamerica Title Insurance Company is defending the 'Driver' action without a reservation of rights. There is, therefore, no conflict of interest.*
> 2. Transamerica Title Insurance Company is funding the prosecution of the malpractice action against Allen Matkins. As we have a signed

'first dollar' agreement, there is no conflict of interest.

3. It appears your only concern is the prosecution of the cross-complaint in the 'Driver' action. At this time, there is a stay; but I believe that if relief were obtained, Transamerica Title Insurance Company would be in favor of prosecuting same. Our prosecution, however, would only be financed until such time that we would prevail against Driver and you would be able to walk away without further payment. Transamerica Title Insurance Company, as I told you, is not obligated to prosecute any cross-complaints. We will do so only until such time as exposure to Driver is eliminated. ***This is not a conflict of interest entitling you [to] your own counsel at our expense. I hope this addresses your concerns, but if you have any further questions, please let me know.*** [Emphasis added.] (App., at 813-814.)

And by its April 7, 1993 letter from its lawyer, Transamerica represented to Mayer:

> ***Transamerica Title is defending*** HBA, Wilmore City Development, Inc. and ***Joseph P. Mayer in the subject litigation relating to the mechanic's lien filed by C.W. Driver***. . . . Nor does Transamerica Title have any obligations to anyone other than ***its named insureds***. (App., at 815-818.)

J. The trial court entered judgment in favor of Driver

In December 1993, the trial court entered judgment in favor of Driver, based on the arbitration award. Notably, that judgment was rendered against HBAL, Wilmore *and the Mayers – individually*. (App., at 458, 460-465.)

K. Transamerica buys Driver's judgment against the Mayers

After entry of judgment on the award, Transamerica "settled" HBAL's claim under the title insurance policy without the Mayers' consent and over their objections by buying the judgment from Driver for $3.9 million. (App., at 358.) Thus, Transamerica from December 1993 has owned the judgment against the Mayers, *individually*, which, with interest and attorneys' fees, is now approximately $8 million. (App., at 358.)

At the direction of HBAL's counsel Malcolm Misuraca and Joseph Giden, Transamerica cut off funding to the Mayers' attorneys, left the Mayers without representation, and settled the Driver action without their consent and over their objection. (App., at 44-45.) Not only did Transamerica abandon the Mayers, but it also put together a settlement agreement that was directly contrary to the Mayers' interests. Transamerica purchased the Driver judgment now in excess of $8 million – which it is now pursuing against the Mayers! (App., at 358.)

As a further proximate result of conduct by Transamerica, the Mayers have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out-of-pocket expenses. (App., at 374, ¶ 175.) As a further proximate result of Transamerica's conduct, the Mayers were compelled to retain legal counsel to obtain the benefits due under the policy. (App., at 374, ¶ 176.)

Based on these facts, the paramount question before this Court is whether a party (such as Mayer) who (1) is named in a recorded mechanic's lien as an owner of certain real property; (2) is sued by the lien claimant in his capacity as owner and partner; (3) is an indemnitor to an insurance company in his capacity as an owner of a partial interest in the insured real property; (4) is a partner of the named insured in a title insurance policy; (5) is told by the insurance company's vice-president and senior claims counsel that he is being defended in the mechanic's lien action without reservation of rights; (6) is represented in the mechanic's lien action by a lawyer chosen by him and paid by the insurance company; (7) is given $2 million in authority by the insurance company to settle the mechanic's lien suit; (8) has tentatively accepted a settlement offer from the lien claimant that would eliminate any judgment by the claimant, which settlement was scrapped by the insurance company's disruptive conduct; (9) sees the lien claimant's judgment being purchased by the insurance company; (10) is left without paid counsel when he refuses to sign a release agreement in favor of the insurer; and (11) is opposed while *in pro per* at the trial level and at the appellate level by counsel paid by his own insurance company has standing to sue that insurance company.

In sum, the prior related actions are not *res judicata* or collateral estoppel, and so are irrelevant to the issue before this Court.

LEGAL DISCUSSION

1. THE APPELLATE COURT ERRED IN HOLDING THAT THE MAYERS, THOUGH PARTNERS AND CO-OWNERS OF THE PARTNERSHIP'S PROPERTY, DO NOT HAVE STANDING TO SUE TRANSAMERICA FOR ITS BAD-FAITH HANDLING OF THEIR DEFENSE

As noted above, the Mayers were sued in the Driver action not only as partners, but also as co-owners of the partnership's property. Transamerica then provided them a defense from October 1990 to November 1993 and advised Mayer, in response to his expressed concern about a conflict of interest, that the defense was being provided without a reservation of rights. But when the Mayers would not sign a release absolving Transamerica of any claim for bad faith, Transamerica turned on its insureds, cut off funding for Mayers' counsel in both cases, and – almost unbelievably – paid opposing counsel to oppose the Mayers at both the trial and appellate levels, and – even more so – purchased the judgment ultimately obtained against them.

A. Joseph Mayer was sued as a partner and property owner

In the Driver action, Joseph Mayer was sued in his capacity as a general partner of HBAL and as owner of an interest in the real property; ultimately an arbitration award and judgment were entered against him *in his capacity as a partner.*[1] When the Driver mechanics' liens were filed in October 1985 and March 19, 1986, Corporations Code § 15025 provided, "A partner is a co-owner with the other partners of

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[1] App. 407, 409, 412, 929, 1013-1014. (For the Court's convenience, petitioners have included pertinent pages of the *Driver* complaint in their List of Attachments.)

specific partnership property holding as a tenant in partnership." Although Corporations Code § 15025 was abrogated by the enactment of the Uniform Partnership Act of 1996, all relevant circumstances, including the filing of suit in this action, occurred prior to that change.

The law during that period confirmed that a partnership could properly be considered an "entity" only for procedural purposes and that for all other purposes, including ownership interests, a partnership is considered to be an "aggregate of individuals." As noted in 9 Witkin, Cal. Summary, *Partnership*, section 15:

> Whether a partnership is a distinct legal person or entity or merely a group of individuals is a question which sometimes has important implications. The Partnership Act, in the main, follows the aggregate or common law theory. (See Com. Note, 6 U.P.A. (Master Ed.), p. 6; *Reed v. Industrial Acc. Com.* (1937) 10 C.2d 191, 192, 73 P.2d 1212 ["Occasional suggestions of this 'entity' theory of partnership are found in statutes or decision, but apart from exceptional situations, ***a partnership is not considered an entity, but an association of individuals***"] . . . . (Emphasis added.)

Other California authorities firmly establish that, under the law as it existed in and before 1995, a partnership is not an entity and the individual partners have individual rights with respect to the partnership property. As discussed in *Rudnick v. Delfino* (1956) 140 Cal.App.2d 260, 266, "[a] partnership in the eyes of the law is not a legal entity even though it may be sued under the firm name, by

reason of the provisions of section 388 of the Code of Civil Procedure." On the basis of that same reasoning, the court in *Riddle v. Lushing* (1962) 203 Cal.App.2d 831, 836, held that the individual partners were protected by this state's anti-deficiency legislation despite the fact that the partnership property was held in the partnership's name and the partners signed individual guarantees. Essentially, the court held that the partners' individual guarantees did not abrogate application of the anti-deficiency legislation because the partners were, in fact, the true owners of the property through the partnership:

> The partnership, Midland Investment Co., is not a legal entity, and the defendants, as the only partners therein, were the purchasers of the property, and they were jointly liable for the balance of the purchase price. "Any estate in real property may be acquired in the partnership name." (Corp. Code, § 15008, subd. (3).) Defendants, as the only partners, acquired title by the deed (in the partnership name) as co-owners, holding as tenants in partnership. (See Corp. Code, § 15025, subd. (1), supra.) It is conceded that the note and trust deed were given as part of the purchase price of the property. The court could find, under the evidence, that the note, trust deed, and guaranty were parts of one transaction. Under the circumstances here, the signing of the guaranty did not change the nature of the transaction and render section 580b inapplicable to defendants. The court did not err in determining that judgment for plaintiffs is barred by said section 580b. (*Ibid.*)

Moreover, as the court in *United Savings and Loan Association of California v. Hoffman* (1973) 30 Cal.App.3d 306, 312, noted in awarding surplus receivership funds to the individual partners where the partnership was a successor beneficiary in a trust deed transaction, "partnerships for several years in this state have been permitted to sue in both their assumed and known names."

Thus, under the law as it existed at the time of the events relevant to this action, a general partner of a limited partnership was part of an aggregate of individuals who had individual interests in the ownership of the partnership property.[2] Although the Partnership Act in effect at that time still limited the actions a partner could take with respect to the sale or transfer of the partnership property (Corp. Code section 15025), the statutory reality is that the partners remained co-owners.

In an analogous context, the United States Supreme Court recently held that co-owners in a tenancy by entirety, i.e., ownership of property by a husband and wife, held separate, individual interests in that property, thereby overruling the district court's conclusion under state law that tenancy by the entirety constituted ownership by an entity which

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[2] The appellate court's reliance on *Tinseltown Video, Inc. v. Transportation Ins. Co.* (1998) 61 Cal.App.4th 184, 197-200 and *Bartlome v. State Farm Fire & Cas. Ins. Co.* (1989) 208 Cal.App.3d 1235, 1239-142 to the effect that the individual partners in a partnership have no right to sue for injury to the partnership property is misplaced. First, *Tinseltown*, an insurance coverage case, dealt with the right of the partners to sue a third party for interference with the right of possession of the partnership property, not actual damage to it. Second, *Bartlome*, also an insurance coverage case, dealt with the converse question, i.e., did an insurance policy issued to a partner cover property owned by the partnership. Neither case deals with the issue here: Whether, under the law as it existed in and before 1995, a partner has standing to sue for injury to the partnership property. In any event, to the extent that these cases could be construed as being relevant or controlling, they should be disapproved.

precluded the existence of individual interests in the property. (*United States v. Craft* (2002) 122 S.Ct. 1414.)

Like tenancy by the entirety, tenancy in partnership creates separate interests in the property itself, although the exercise of power over those separate interests may well be limited. But the fact remains that, under the law as it existed at the time in question, the ownership of those property interests properly establishes standing to sue by the general partner with respect to damage or injury to those individual partnership interests in the property. (*Gantman v. United Pac. Ins. Co.* (1991) 232 Cal.App.3d 1560, 1566 [the person who owns or holds title to the claim or property involved, as opposed to others who may be interested or benefited by the litigation, has standing to sue].)

Given that the UPA of 1996 specifically provides that it does not apply to rights accrued prior to its effective date (Corporations Code § 16112), Mayer, as a general partner, had a property interest in the partnership property in December 1985 (when the Driver action was filed) and on March 12, 1986 (when the Transamerica policy was purchased).

The law, during the time at issue, provides that an insurance policy insuring a partnership also insures the partners for their acts done in the usual course of partnership business. In *Milazo v. Gulf Ins. Co*, the second-appellate district held that when a partnership is the named insured, a partner qualifies as an insured "with respect to his liability as a partner."[3]

There is a completely independent ground for the Mayers' standing as insureds, as the Mayers were part owners of the insured property:

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[3] *Milazo v. Gulf Ins. Co.* (1990) 224 Cal.App.3d 1528.

> No person may recover on a policy of insurance unless that person has an insurable interest in the property insured. Insurable interest is defined as: "Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured ...." (Ins. Code, § 281.) Simply phrased, an insurable interest exists when "the insured has a direct pecuniary interest in the preservation of the property and ... will suffer a pecuniary loss as an immediate and proximate result of this destruction." (*California Food Service Corp. v. Great American Insurance Co.* (1982) 130 Cal.App.3d 892, 897.)

Moreover, when Transamerica promised to defend the HBAL partnership in the Cases Agreement, it necessarily insured all the partners (App. 142-157), including the Mayers. Driver sued the Mayers in their capacity as partners of the partnership, as owners of partial interest in the insured real property, as agents and alter egos of the partnership, and as guarantors of the partnership liabilities. (App. 695-703.)

In *Goss v. Security Ins. Co.* (1931) 113 Cal.App. 577, 579, an automobile policy insuring "Pacific Motor Company" was held to cover the liability of the three partners. (*Id.*)

Additional California authority supports the rule that partners are covered by insurance policies for the partnership whenever the partners' acts are done in the usual course of partnership business.

In California, "insurance on a joint venture covers liability of the individual partners or joint venturers." (*Quetnick v. McConnell* (1957) 154 Cal.App.2d 112, 119 (citing *Reed v. Industrial Acc.*

Comm., (1937) 10 Cal.2d 191); *Goss v. Security Ins. Co.* (1931) 113 Cal.App. 577.)

In *Ticor Title Insurance Co. of Calif. v. American Resources, Ltd.* (1988) 859 F.2d 772, the U.S. Court of Appeals for the Ninth Circuit, decided that Hawaii would follow California law in holding that a party to a joint venture is covered under a title insurance policy obtained by the joint venture, thereby negating the insurer's argument that the joint venture was the policy's only named insured. The *Ticor* Court cited to the California precedents of *Quetnick*, *Reed*, and *Goss*, *supra*. (*Ticor*, *supra*, 859 F.2d 772, 774.)

The reasoning of all the above cases apply to title insurance because in *Lambert v. Commonwealth Land Title Insurance Co.* (1991) 53 Cal.3d 1072, our Supreme Court explicitly held:

> ***The duty to defend in a title insurance case is governed by the same principles which govern the duty to defend under general liability polices.*** [Citations omitted.] The duty commences upon tender of the defense, and continues until the underlying lawsuit is concluded. [Citation omitted.] *Lambert*, *supra*, 53 Cal.3d at 1077, emphasis added; see also Appleman, 9 Insurance Law & Practice §5215.

Moreover, Transamerica waived any right to contest coverage. California law directs, "The carrier may accept defense of the lawsuit without raising any objection to coverage. [But] by doing so, the insurer waives its right to contest coverage at a later date."[4]

In numerous **letters**, agents and

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[4] See *Truck Ins. Exchange v. Superior Court* (1996) 51 Cal.App.4th 985, 993, citing to *Miller v. Elite Ins. Co.* (1980) 100 Cal.App.3d 739; see also *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App 4th 1810.)

representatives of Transamerica, Davida Tussman and Joseph Giden, unmistakably communicated to Joseph Mayer that Transamerica Title Insurance Company was defending the partnership and the individual partners – the Mayers – in the Driver action **without reservation of rights.** (App. 813-823, 826-828.)

Since Joseph Mayer was sued in the Driver action in his capacity as a general partner of HBAL, he was covered under the Transamerica title insurance policy to the extent of his liability as a *partner*[5] -- which here was for the entire amount of the Driver judgment. Since Mayer was covered under the policy, Transamerica owed him not just a duty to defend, but also a duty to indemnify. Consequently, Mayer has had standing to sue Transamerica.

Thus, it is important to the stability of insurance interests in this state that this issue be addressed and the appellate court's erroneous abrogation of partnership rights be corrected.

B. The Mayers were defended by Transamerica as partners and property owners

The undisputed fact is that Transamerica *was* providing the Mayers both an actual and a courtesy defense.[6] Accordingly, under the applicable case law, Transamerica owed the Mayers a duty of good faith, just as if they were insureds.[7]

That is, an insurer who voluntarily provides a

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[5] See *Milazo v. Gulf Ins.* (1991) 224 Cal.App.3d 1528, 1537-1538; see also *Ticor Title v. American Resources* (9th Cir. 1988) 859 F.2d 772, 774; *Quetnick v. McConnell* (1957) 154 Cal.App.2d 112, 119; *Reed v. Ind. Acc. Comm'n* (1937) 10 Cal.2d 191, 192.

[6] See App. 679-680, 813-823, 826-828, 981, 983-985, 988, 990, 991, and 994.

[7] See *Mosier v. So. Cal. Physicians Ins. Exch.* (1998) 63 Cal.App.4th 1022, 1040-1041.

"courtesy defense" to an uninsured party assumes the duty to defend the uninsured party as if he were in fact its insured, including the duty to appoint independent counsel when the insurer and the party have conflicting interests. (*Mosier v. Southern California Physicians Insurance Exchange* (1998) 63 Cal.App.4th 1022.)

Therefore, regardless of the existence of the policy or the duties under the Cases Agreement, Transamerica owed the Mayers duties to defend and to act in good faith. Transamerica's offer of a "courtesy defense" to Joseph Mayer imposed on the insurance company a duty of good faith and fair dealing to the allegedly noninsured Mayers, which obligated Transamerica to hire lawyers who would act in the Mayers' best interests.

In *Mosier, supra*, 63 Cal.App.4th 1022, the second-appellate district held that a noninsured party who is provided a "courtesy defense" by an insurer is entitled to the same covenants of good faith and fair dealing as an insured, including the right to be provided with independent counsel who will vigorously represent such party in conflicts with the insurer.

> We conclude that [the insurer] SCPIE's voluntary action of providing a defense to [the party receiving the courtesy defense] Jouvenat created a relationship giving rise to a duty on behalf of SCPIE towards Jouvenat based on the principle that one who voluntarily comes to the aid of another, having no initial duty to do so, becomes bound to exercise due care in the performance of the duties it undertakes to provide. Under the same principle, the volunteer may become liable when harm is suffered by the

> victim in reliance upon the undertaking of the volunteer.[8]

In *Mosier*, the appellate court held, "SCPIE was in a position to mold the outcome of the underlying litigation to benefit its own financial interests by diminishing the liability of its insureds at the expense of Jouvenat." (*Mosier*, *supra*, 63 Cal.App.4th 1022 at 1041)

In *Mosier*, the Court summed things up this way: "We conclude that once SCPIE offered to defend Jouvenat, and Jouvenat accepted the offer, SCPIE owed the same duties to defend Jouvenat as it would have had Jouvenat in fact been its insured." (*Id.* at 1043.)

Further support for this law is found in this Court's holding in *Tomerlin v. Canadian Indemnity Co.* (1964) 61 Cal.2d 638 where this Court held that an insurer's attorney's representations that the personal liability insurer would afford full coverage estopped the insurer from later denying coverage because the insured had relied on the representation. Believing there was no coverage conflict, the insured discontinued using his personal attorney in defending the action against him, thereby suffering substantial detriment according to the Court.

In *Tomerlin*, the insurer first accepted the defense of an insured under a reservation of rights so the insured retained his own attorney. (*Id.*, 61 Cal.2d 638, 641.) During the litigation, the insurer's attorney notified the insured's attorney that the insurer would afford coverage without reservation. Based on that notice, the insured discharged his personal attorney. (*Id.* at 642) One month after a verdict was entered against the insured, the insurance company denied coverage. The Court held that the insured had relied

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[8] *Mosier*, *supra*, 63 Cal.App.4th 1022 at 1040-41, citations omitted.

to his detriment by discharging his attorney, and explained, "Such detriment inheres in the denial of personal representation at the moment when the posture of the case calls for the protection of plaintiff's rights." (*Id.* at 646-647) The attorney's double agency relationship "bristled with diverging interests." . . . "[T]he insured's interests lie in the settlement of the claim prior to trial since he loses nothing thereby, while the insurer's advantage may inure in risking a larger liability in the hope of winning a judgment of nonliability or of a liability upon a ground outside the coverage of the policy. (See Keeton, Liability Insurance & Responsibility for Settlement (1954) 67 Harv. L. Rev. 1136, 1142; cf. *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654...)." (*Tomerlin, supra*, at 647) Thus, the insurer had breached its duty to inform the insured of the conflict and was liable for the judgment. (*Ibid.*)

Here, Transamerica, through its agents, repeatedly conceded that the Mayers were provided a "courtesy defense" in the Driver action.

For example, on March 13, 1992, Transamerica, wrote to Mayer, unequivocally stating, "Transamerica Title Insurance Company is defending the 'Driver' action without reservations of rights." (App. 813-814.) And when asked at deposition, "So Mr. Mayer was being defended [in the litigation relating to the mechanics' liens filed by C.W. Driver]?" Transamerica's Counsel answered, "He was a named party in the underlying action; so he and all the named parties were being defended." (App. 994.)

At his deposition, Transamerica's other counsel stated that Transamerica "provided a defense to the Mayers in the *Driver* case," (App. 981, emphasis added.)

Transamerica's attorney and claims manager, Joseph Giden, also conceded that a courtesy defense was provided to the Mayers, stating at his deposition, "It was my understanding that Transamerica was

providing Mr. Mayer a courtesy defense from the first time I became aware that he was being afforded a defense throughout the entire period of my involvement." (App. 988.)

In addition, Giden wrote several letters in which he referred to Transamerica's providing a "courtesy defense" to the Mayers. (App. 990.) Such letters include the following:

On April 7, 1993, Giden wrote to Mayer:

> . . . ***Transamerica Title is defending*** HBA, Wilmore City Development, Inc. and ***Joseph P. Mayer in the subject litigation relating to the mechanic's lien filed by C.W. Driver.***

On April 8, 1993, Giden wrote Mayer stating:

> ***The obligation of Transamerica to defend*** Huntington Breakers Apartments and ***you*** is governed by the terms of the policy of title insurance and specifically insuring agreements relating to the Driver mechanic's lien. ***Transamerica has and intends to continue to fulfill those obligations.*** (App. 819, 821, emphasis added.)

On April 27, 1993 Giden wrote , to two different law firms confirming that they would defend, among others, general partner Joseph Mayer:

> ***I am writing at the request of my client, Transamerica*** Title Insurance Company ('Transamerica Title'), to confirm your retention in connection with your defense of the subject matter. . . . [¶] At the expense of Transamerica Title, ***you are both retained to defend***

> Huntington Breakers Apartments, Ltd. and its ***general partners*** in the subject matter. . . . [¶] It is expected that each of your offices will exercise your best legal judgment and devote all necessary legal resources to the ***defense of*** Huntington Breakers Apartments, Ltd. and its ***general partners***. (App. 822-823, emphasis added.)

On May 5, 1993 Giden wrote Mayer, advising him that Transamerica was paying an attorney to defend *him* in the Driver action:

> The attorney whom you selected and is being paid by Transamerica Title Insurance Company ***to defend you*** in the Driver action is George Coleman. (App. 826, emphasis added.)

Finally, Giden testified unequivocally at his deposition, "Transamerica never withdrew the courtesy defense." (App. 991.) He added that the defense did not end until the judgment was entered against Mr. Mayer: "Transamerica stopped paying when the judgment was entered, there was no need for any further defense, there was a judgment against Mr. Mayer. When that judgment was entered they stopped paying." (App. 991.)

In addition to the above admissions by Transamerica, in a document referenced in the Cases Agreement, Joseph Mayer was designated point man **on behalf of** all the parties with respect to the Driver and the Allen, Matkins actions being funded by Transamerica. (App. 154, last paragraph.)

Since the Mayers, as property owners and partners, were (and were treated by Transamerica as) insureds, the Mayers have standing to sue Transamerica for the way in which this insurer fulfilled – or, more accurately, failed to fulfill – its

obligations under the Title Policy and under the Huntington Breakers Cases Agreement.

C. Transamerica's Special Agreement of Indemnification recited that the Mayers were owners of a partial interest in that certain real property

Transamerica contractually proclaimed that the Mayers were owners of a partial interest in the subject real property. As owners of this real property insured by Transamerica, they were necessarily owed duties as insureds under the policy. As insureds, they have standing to sue their insurer, Transamerica.

More specifically, on February 20, 1986, Transamerica required that the Mayers execute, as a condition of its issuance of future policies of title insurance on the property, a Special Agreement of Indemnification in which it identified Joseph Mayer as an "owner of a partial interest in the real property." (Appellants' Opening Brief ["AOB"] at pp. 4-5.) That agreement also stated that Transamerica "has been requested to issue its POLICIES of title insurance insuring an interest in and title to the real property...described in that certain Preliminary [Title] Report bearing Transamerica order no. 0820289 and dated January 15, 1986 ...and titled 'Huntington Breakers' and, whereas **the Indemnitors are the current owners of a partial interest in the real property**." (*Ibid.*, emphasis added.)

In this way, Transamerica confirmed the Mayers' status as owners of a partial interest in the insured property, and the were insureds under the Transamerica policy of title insurance.

D. Transamerica's conduct toward another partner demonstrates its intent to insure all the partners, including the Mayers

Transamerica demonstrated its intent to include partners as insureds when, by its actions, it considered partner Pacific Savings as an insured. More specifically, in February 1986, Transamerica admitted that it intended to provide title insurance for the Driver action to a new partner in Huntington Breakers Apartments, Ltd. ("HBA"), Pac Fed and/or its affiliates. After Driver sued Pac Fed's affiliate, Pacifica Real Property Investments Corporation, Transamerica stated that it intended to insure Pacific Savings Bank, a partner of HBA.[9] If, as Transamerica has conceded, it intended to insure partner Pac Fed, then the Mayers, as partners, were also insureds.[10]

E. As victims of Transamerica's conduct, the Mayers also have constitutional standing to pursue this action

In *Pershing Park Villas Homeowners v. United Pacific Ins. Co.*, 219 F.3d 895, 897-898 (9th Cir. 2000), the insured real estate developers and homeowners sued their liability insurer for withdrawing its defense in a construction-defect suit brought by the homeowners' association. The Ninth Circuit ruled that the developers had "constitutional standing" to pursue this action upon a showing of "injury in fact, causation of that injury by the defendant's conduct, and redressability of the injury by the requested relief."[11] The Ninth Circuit added that even though the developers did not have title to their claims, they

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[9] AA. 112:18-22; 137-138.

[10] AA 485, 486, 489, 495, and 498

[11] *Pershing*, at 900.

still have had constitutional standing to sue.[12]

Therefore, even if the Mayers lacked property ownership regarding the title insurance, they still have constitutional standing to pursue this action against Transamerica since, as set forth above, Transamerica's conduct caused the Mayers injury in fact, which injury can be redressed by the relief sought.

It is important to the stability of the partnership interests in this state, as well as the interests of the thousands of insureds in this state who have been wronged by the insurers and who are owed a duty of defense by their insurers, that this issue be addressed and that the appellate court's erroneous abrogation of the rights of both partners in particular and insureds in general who are defended by their insurers in civil actions be corrected.

2. THE APPELLATE COURT'S DECISION ERRONEOUSLY HELD THAT TRANSAMERICA'S DUTY TO DEFEND THE MAYERS COULD BE DETERMINED NOT IMMEDIATELY, BUT RATHER RETROACTIVELY BASED ON SUBSEQUENT APPELLATE-COURT'S DECISIONS

The second aspect of the appellate court's decision requiring review is its determination that appellate decisions issued years after the Mayers had tendered their defense to Transamerica (which undertook to provide a defense) can be retroactively applied to negate a duty. This, even though (1) the duty to defend, as a matter of law, arises immediately; and (2) none of these subsequent appellate decisions ever held that the Mayers did not have standing to sue Transamerica.

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[12] *Id.*, at 900-901.

A. Transamerica's duty to defend the Mayers was triggered and to be determined on March 12, 1986

Transamerica's duty to defend the Mayers arose, as a matter of law, *immediately*, that is, upon the existence of the potential for coverage. In this case, the Mayers' tender of defense to Transamerica occurred at 7:30 a.m. on March 12, 1986. As a matter of law, that is when Transamerica's duty to defend the Mayers was triggered and to be determined.

Whether an insurer owes a duty to defend to its insured is measured ***at the time of the tender of defense***:

> This Court concludes that the law contemplated by the California Supreme Court requires a measurement of the duty to defend at the time the insured tenders defense of the third party action to the insurer.[13]

As this Court has declared, "Imposition of an immediate duty to defend is necessary to afford the insured what it is entitled to: the full protection of a defense on its behalf . . . ."[14] And so it is of no consequence how the appellate-courts ruled more than ten years after Transamerica's duty to the Mayers arose.

The law is well established that the duty to defend is based on information available at the time of tender and cannot be adjudged in hindsight.[15]

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[13] Montrose, supra, at 295.

[14] *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 301.

[15] See *id.* at 295; see also *Haskel, Inc. v. Superior Court* (1995) 33 Cal.App.4th 963, 978.

That is, the determination whether the insurer owes a duty to defend rests on the allegations of the complaint and extrinsic facts known to the insurer at ***the time of tender***.[16]

Furthermore, the duty to defend attaches immediately upon the existence of a possibility of coverage. This Court has declared that "[i]mposition of an immediate duty to defend is necessary to afford the insured what it is entitled to: the full protection of a defense on its behalf . . . ."[17] Based on the information available to Transamerica (*i.e.*, the contested allegations of the Driver action), its duty to defend was immediately triggered at the point of tender.

Further support to determine the duty to defend in hindsight is found in *Mullen v. Glens Falls Ins.*, where the court was faced with the issue whether an insurance company can, without having all of the facts before it, refuse to defend an insured in a lawsuit brought against the insured.[18] The appellate court responded by holding that an insurer (cannot contrive a retroactive justification for its denial of a defense, but must provide the defense) if a potential for coverage existed at the time, or else be stuck with its reasons for denying the defense when the denial is made:

> We believe that public policy alone mandates a negative answer to the question; ***otherwise an insurance carrier could refuse to defend its insured on the slightest provocation and then resort to hindsight for the justification***. Furthermore, a contrary

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[16] See *Id.* at pp. 296-299, emphasis added.

[17] *Id.* at 301.

[18] *Mullen v. Glens Falls Ins. Co.* (1977) 73 Cal.App.3d 163, 173 (emphasis added).

> holding – would force the insured to finance his own investigation and the defense of the lawsuit, and then to seek reimbursement in a second lawsuit against the insurance company. This, in turn, could not only impose an undue financial burden on persons who have purchased insurance protection, but it could deprive them of the expertise and resources available to insurance carriers in making prompt and competent investigations as to the merits of lawsuits filed against their insureds. We simply reiterate the admonitions of the Supreme Court in *Gray v. Zurich Insurance Co., supra*, (citation), that an insurance company '... bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy' (citation), and that this duty does not dissolve '... simply because the insured is unsuccessful in his defense and because the injured party recovers on the basis of a finding of the assured's wilful conduct' (citation).[19]

Therefore, Transamerica's duty to defend the Mayers was triggered only by those facts, documents, and evidence that existed at the time that the Mayers, in March 1986, first tendered the defense of the Driver action to Transamerica. Any other basis, including subsequent appellate decisions in other cases, would be irrelevant to the issue of Transamerica's duty to defend.

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[19] See *Mullen, supra*, at 173-174, emphasis added.

B. The subsequent appeals relied on by the Court of Appeal were decided years later and on immaterial issues

In sustaining Transamerica's demurrer without leave to amend and granting its motion for summary judgment, the trial court in part based its decision (affirmed on appeal) on the previous cases involving the Mayers entitled C.W. Driver v. Huntington Breakers Apartments, Ltd., *et al.*, and HBAL, Mayer *et al.* v. Allen Matkins. But neither case held that the Mayers did not have standing to sue Transamerica.

Rather, those prior cases held only that the Mayers did not have standing to sue Allen Matkins and that their cross-complaint against Driver was moot.[20] Nevertheless, the appellate court assumed, incorrectly, that one or another of the decisions in the related actions was that the Mayers did not have standing to sue Transamerica. The issue of the affect of those prior decisions was not raised by either side in its brief. In any event, those cases held only that the Mayers did not have standing to sue Allen Matkins and that their cross-complaint against Driver was moot.[21] For that reason, the appellate court was mistaken in relying on the purported force and effect of these irrelevant holdings on this case. None of the prior cases decided whether the Mayers could sue Transamerica.

In sum, the prior related actions are not *res judicata* or collateral estoppel, and so are irrelevant to the issue before this Court. Any failure of the Mayers to mention them in the appellate briefs is also irrelevant. The appellate court's reliance on this omission in affirming the trial court's ruling was therefore erroneous.

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[20] App. 180, 194-195.
[21] App. 180, 194-195.

CONCLUSION

Given the importance in this state of the rights of not only partners to a partnership but, more importantly, insureds in general, to a full, complete, and good-faith defense by their insurers, the appellate court's erroneous determinations on the above two issues require this Court's review and correction. Such review is respectfully requested.

DATED: August 23, 2002

Respectfully Submitted,
SHERNOFF BIDART & DARRAS
By:_____

MICHAEL J. BIDART
DOUGLAS M. CARASSO
Attorneys for Petitioners,
Appellants, and Plaintiffs

Mayer v. Transamerica
Case No.: BC107066

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On **August 23, 2002**, I served a copy of the foregoing documents described as: **PETITION FOR REVIEW** on the interested parties in this action:

PLEASE SEE ATTACHED LIST.

[XX] BY MAIL I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Claremont, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing an affidavit.

[ ] BY FACSIMILE ("FAX") a copy was sent by FAX as follows:

[ ] BY PERSONAL SERVICE I delivered such envelope by hand to the offices listed above.

[] BY FEDERAL EXPRESS OVERNIGHT MAIL/ COURIER to expedite the delivery of the above-named

document, said document was sent via overnight courier for next day delivery to the above-listed party.

[X] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **August 23, 2002,** at Claremont, California.

_____

ISABEL CISNEROS-DRAKE

Mayer v. Transamerica
Case No.: BC 107066

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Richard B. Wolf, Esq.
LEWIS, D'AMATO, BRISBOIS &
BISGAARD, LLP
221 North Figueroa Street, Suite 1200
Los Angeles, California 90012
(213) 250-1800
(213) 250-7900 (Fax)

Co-Counsel for Defendant
TRANSAMERICA TITLE INSURANCE COMPANY

1 Copy

Joseph M. Giden, Esq.
GIBBS, GIDEN, LOCHER & TURNER
2029 Century Park East, 34th Floor
Los Angeles, California 90067
(310) 552-3400
(310) 552-0805 (Fax)

Attorney for Defendant
TRANSAMERICA TITLE INSURANCE COMPANY

1 Copy

John H. Brink, Esq.
IRSFELD, IRSFELD & YOUNGER
100 West Broadway, Suite 900
Glendale, California 91210
(818) 242-6859
(818) 240-7728 (Fax)

1 Copy

Thomas V. Girardi, Esq.
GIRARDI & KEESE
1126 Wilshire Boulevard
Los Angeles, California 90017
(213) 977-0211
(213) 481-1554 (Fax)
Clerk of the Court of Appeal
Second Appellate District
Division Three
North Tower, Floor 2
300 South Spring Street
Los Angeles, CA 90013-1213
Co-Counsel for Plaintiffs

1 Copy

Honorable Barbara Meiers
Los Angeles Superior Court, Dept. 12
Clerk of the Superior Court
111 North Hill Street
Los Angeles, CA 90012-3117

1 Copy

Court of Appeal,
Second District, Division 3, California.

Joseph P. MAYER III et al., Plaintiffs and Appellants,

v.

TRANSNATION TITLE INSURANCE COMPANY,
Defendant and Respondent.

No. B147731.
(Los Angeles County Super. Ct. No. BC107066).
July 15, 2002.

General and limited partners sued title insurer, alleging breach of title insurance policy, breach of agreement in prior litigation involving partnership, breach of implied duty of good faith and fair dealing, fraud, intentional interference with economic relations, negligence, and constructive fraud. The Superior Court, Los Angeles County, No. BC107066, Barbara A. Meiers, J., sustained a demurrer to several counts in complaint, granted summary judgment in favor of insurer, and awarded insurer attorney fees. General and limited partners appealed. The Court of Appeal, Kitching, J., held that: (1) prior appellate opinion reversing grant of summary judgment to title insurer was not law of case on issues raised in current appeal; (2) grounds for rulings that general and limited partners did not address on appeal would not be addressed; and (3) insurer was entitled to recover its reasonable attorney fees incurred in action without limitation.

Affirmed.

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Affirmed.

Girardi Keese, John A. Girardi; Shernoff Bidart & Darras, Michael J. Bidart and Douglas M. Carasso for Plaintiffs and Appellants.

Lewis, D'Amato, Brisbois & Bisgaard, Richard B. Wolf and Steven Mark Levy for Defendant and Respondent.

KITCHING, J.

*1 Joseph P. **Mayer** III and Eleanor **Mayer** appeal a judgment entered in favor of Transnation Title Insurance Company, formerly known as **Transamerica** Title Insurance Company **(Transamerica),** after the trial court sustained a demurrer to several counts in the **Mayers'** complaint and then granted summary judgment. The rulings are based in part on the conclusion that the **Mayers** have no standing to sue **Transamerica** because they are not insureds under a title insurance policy. The **Mayers** contend an opinion by this court reversing a prior summary judgment established as law of the case that there are triable issues of fact concerning their standing to sue **Transamerica,** and those triable issues still exist. They also contend they are insureds both under the title insurance policy and because Transamerica provided them a courtesy defense. The Mayers also challenge an attorney fee award.

We conclude that the issues decided in our prior opinion differ from those presented in this appeal and therefore do not govern the present appeal. Although the Mayers invoke our prior opinion in this case, they fail to discuss final decisions in related cases that the trial court determined preclude the Mayers' claims in this action, and they fail to address other asserted grounds for the trial court's rulings. Since the Mayers

do not challenge those grounds, we conclude that they have not shown prejudicial error. We also conclude that the Mayers have not shown error in the attorney fee award.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Partnerships*

Huntington Breakers Apartments, Limited (HBA) is a limited partnership that was formed in March 1983 to develop an apartment complex in Huntington Beach. Joseph Mayer and Wilmore City Development, Inc. (Wilmore), were the original general partners, and Eleanor Mayer and others were the original limited partners.

HBA hired C.W. Driver, a general contractor, in May 1984 to build the apartments. HBA and each of its general and limited partners guaranteed payment of the construction contract.

HBA sought additional funds to complete the construction. Pacific Federal Savings and Loan (Pacific Savings) provided the funds in August 1985 in exchange for a 50 percent ownership interest in HBA as a new general and limited partner.

Huntington Breakers Managing Partnership (HBM) is a general partnership that was formed in August 1985 to manage HBA. Joseph Mayer and Wilmore are general partners in HBM. The HBM partnership agreement established a management committee of three individuals, including Joseph Mayer and two of HBA's limited partners (both officers of Wilmore) other than Eleanor Mayer, and provided that the committee would make all partnership decisions on a two-thirds vote.

2. *The* Driver *Complaint and Cross-Complaint*

C.W. Driver sued HBA, HBA's original general and limited partners, and others in December 1985 for money due and to foreclose a mechanics lien and petitioned to compel arbitration to determine the amount due on the construction contract (the *Driver* case). The complaint also alleged that HBA and its partners guaranteed payment of the contract. HBA and its original general and limited partners cross-complained against C.W. Driver and others for construction defects.

3. *The Title Insurance, Indemnity Agreement, and Assignment*

*2 **Transamerica** agreed to issue a title insurance policy to insure against loss suffered by reason of the enforcement or attempted enforcement of C.W. Driver's mechanic's lien and action, provided that Joseph **Mayer,** Wilmore, and two of HBA's limited partners agreed to indemnify **Transamerica** for that coverage. The purpose of this arrangement was to protect Pacific Savings's investment. Accordingly, Joseph **Mayer,** Wilmore, and the two limited partners executed a Special Agreement of Indemnification (Indemnity Agreement) in February 1986 in which they agreed to indemnify **Transamerica** for any loss arising from **Transamerica's** coverage of the mechanic's lien and action to enforce the lien and agreed at their sole expense to defend any action based on a mechanic's lien, clear any cloud on title created by a mechanic's lien, and satisfy any judgment based on a mechanic's lien. Transamerica then issued a title insurance policy in March 1986 in favor of HBA as insured including an endorsement providing coverage for loss caused by reason of the enforcement or attempted enforcement of a mechanic's lien or action to enforce a mechanic's lien.

HBA assigned all of its "right, title and interest" in the *Driver* case "and all successor and replacement actions and suits" to its original general and limited partners and HBM in an Assignment dated December 31, 1986. The partners and HBM agreed to indemnify and defend HBA against any loss "arising from or relating to" the *Driver* case. The Assignment stated that the partners and HBA appointed HBM as their attorney-in-fact in connection with the *Driver* case "and all successor and replacement actions and suits" and that the appointment was irrevocable and coupled with an interest.

4. *The Arbitration Award, Representation Agreement, and Malpractice Action*

A panel of arbitrators awarded C.W. Driver over $3 million against HBA, Joseph Mayer, and Wilmore in October 1990. HBA then tendered its defense to Transamerica to challenge the award and moved to vacate the award.

HBA's original general and limited partners and HBM entered into a Representation and Partial Settlement Agreement (Representation Agreement) in November 1990 in contemplation of a malpractice action against its former attorneys in the *Driver* case. The Representation Agreement provided that HBM would have the ultimate decisionmaking authority in the malpractice action and would make decisions by a majority vote of its management committee.

HBA sued its former attorneys in the *Driver* case for malpractice in May 1991.

The superior court granted HBA's motion to vacate the arbitration award in July 1991.

5. *The Cases Agreement*

HBA, its original general and limited partners, HBM, and Transamerica entered into a Huntington Breakers Cases Agreement (Cases Agreement) in August 1991 to provide for payment of attorney fees and costs in the pending actions. Transamerica agreed to pay up to $1.5 million for attorney fees and costs that it determined to be reasonable and necessary to defend the mechanic's lien claim "against HBA" in the *Driver* case, and agreed to pay all costs that it determined to be reasonable and necessary to prosecute a cross-complaint against a subcontractor by "HBA and related individuals and entities" in the *Driver* case, the complaint by "HBA and related individuals and entities" in the malpractice action, and a bad faith action against a surety. HBA and its related parties, in turn, agreed that the first dollars received in the *Driver* case, malpractice action, or bad faith action would be used to reimburse Transamerica for attorney fees and costs paid by Transamerica.

***3** The Cases Agreement states that it is the entire agreement between the parties with respect to its subject matter.

The parties amended the Cases Agreement in December 1991 to state that Transamerica agreed to pay all *attorney fees and* costs that it determined to be reasonable and necessary to prosecute the cross-complaint against the subcontractor in the *Driver* case, the malpractice action, and the bad faith action.

6. *The* Driver *Appeal, Judgments, and Settlement*

The Court of Appeal reversed the order vacating the *Driver* arbitration award in November 1992. C.W. Driver, HBA, and **Transamerica** negotiated a tentative settlement, but Joseph **Mayer** did not consent and the

settlement was not effected. In December 1993, the superior court entered judgment on the complaint in favor of C.W. Driver and against HBA and the general partners for over $4.5 million. That amount included the amount awarded in the arbitration award plus an additional $1,575,535 in prejudgment interest. The judgment provided that HBA take nothing on its cross-complaint against C.W. Driver.

C.W. Driver, HBA, and Transamerica then achieved a settlement pursuant to which Transamerica paid C.W. Driver $3.9 million, C.W. Driver assigned the judgment to Transamerica, Transamerica agreed not to enforce the judgment against HBA and Wilmore, and HBA and Wilmore released Transamerica from liability. Joseph **Mayer** dissented from the settlement decision, and the **Mayers** refused to release **Transamerica** from liability to the **Mayers** individually.

The superior court entered judgment against the Mayers as cross-complainants and in favor of C.W. Driver and other cross-defendants in September 1994. Division Three of the Fourth District Court of Appeal affirmed the judgments on the complaint and cross-complaint in the *Driver* case in June 1997. (*C.W. Driver v. Mayer* (June 13, 1997, G015658, G016940) [nonpub. opn.].)

7. *The Mayers' Complaint in this Action*

The **Mayers** sued **Transamerica** and others in June 1994. In May 1995, the superior court sustained a demurrer to the second amended complaint with leave to amend due to "non-joinder indispensable parties" and ordered the Mayers to "[j]oin in additional individual parties as defendants."

The third amended complaint filed in June 1995 alleged that **Transamerica** breached its obligations arising from the title insurance policy and the Cases Agreement by refusing to insure the **Mayers** against loss from the *Driver* case, seeking to enforce the *Driver* judgment against them, and refusing to provide the **Mayers** with counsel to defend the *Driver* case and prosecute the *Driver* cross-complaint and malpractice action. The complaint named HBA and its original partners other than the Mayers as "nominal defendants," but made no allegations against them. The Mayers sent a copy of the complaint and a cover letter to the nominal defendants but did not formally serve them. HBA answered the complaint, but the other nominal defendants did not.[1]

*4 **Transamerica** cross-complained against the **Mayers** to enforce the Indemnity Agreement, reform the title insurance policy, and rescind the Cases Agreement.

8. *The Mayers' Complaint Against C.W. Driver*

The Mayers sued C.W. Driver and others in a separate action in May 1995 (*Mayer v. Driver*) alleging construction defects discovered in the previous three years. The Mayers asserted standing to sue as HBA's assignees under the Assignment and as partners with an interest in partnership property. The superior court determined that the action was a successor or replacement of the *Driver* case within the meaning of the Assignment, the Mayers appointed HBM as attorney-in-fact with respect to the *Driver* case and successor or replacement actions, and the Mayers therefore had no standing. The Court of

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[1] We take judicial notice of the third amended complaint and **Transamerica's** cross-complaint, both included in the appellate record in ***Mayer*** *v.* ***Transamerica*** *Title Ins. Co.*, B123556.

Appeal later affirmed the judgment on other grounds, as noted *post.*

9. *The Initial Summary Judgment in this Action*

Transamerica moved for summary adjudication on the **Mayers'** third amended complaint in this action in May 1996 arguing that any rights under the title insurance policy were extinguished and the parties' rights and obligations were governed solely by the Cases Agreement. Transamerica argued that the policy and Indemnity Agreement were a single contract and the Cases Agreement rescinded or was a novation of that contract. The superior court agreed and granted summary adjudication against the counts based on the policy in October 1996.

The Mayers filed a supplemental complaint in December 1996. The superior court struck all allegations relating to the policy.

Transamerica moved for summary judgment on the supplemental complaint in January 1998 arguing that it did not breach its duties under the Cases Agreement. The superior court agreed and granted summary judgment for Transamerica. The Mayers appealed the summary judgment.

10. *The Malpractice Action Settlement and Judgment*

HBA settled the malpractice action against its former attorneys in the *Driver* case in August 1996. HBM decided that HBA would accept the settlement, over Joseph Mayer's dissenting vote. Under the terms of the settlement, the defendant attorneys agreed to pay $2.6 million to **Transamerica** and $2.15 million to HBA, and HBA, the partners other than the **Mayers,** and the defendant attorneys mutually released each

other from liability.[2] The Mayers individually continued to prosecute the complaint against their former attorneys.

The superior court decided that the **Mayers** were not the real parties in interest and had no standing to sue **Transamerica,** and entered judgment against the **Mayers'** complaint in January 1997. We affirmed the judgment on appeal. (*Mayer v. Allen, Matkins, Leck, Gamble & Mallory* (Apr. 9, 1998, B110341) [nonpub. opn.].)

We concluded that the superior court in the *Driver* case had determined that the Mayers were bound by the appointment of HBM as their attorney-in-fact in the Assignment, that appointment included the right to settle the *Driver* case on behalf of HBA and the individual partners, and the Court of Appeal in *C.W. Driver v. Mayer, supra,* G015658 and G016940 decided that the Mayers did not take an effective appeal from that order, so the determination by the superior court in the *Driver* case is res judicata and conclusively establishes that the Mayers relinquished the right to prosecute their purported individual claims against C.W. Driver. Since the damages the Mayers sought against the attorneys were for the alleged mishandling of their purported individual claims against C.W. Driver, we concluded that the Mayers could not maintain an action for injury to purported rights that they had relinquished. (*Mayer v. Allen, Matkins, supra,* B110341, at pp. 17-20.) We also concluded that under the terms of the Representation Agreement, HBM had the sole right to manage the malpractice action on behalf of HBA and the individual partners, so the Mayers had no standing to prosecute individual claims against the attorneys. (*Id.*

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[2] We take judicial notice of the settlement agreement included in the appellate record in *Mayer v. Allen, Matkins, Leck, Gamble & Mallory,* B110341.

at pp. 20-23, 120 Cal.Rptr.2d 535.)

11. *Appeal from the Initial Summary Judgment in this Action*

5** On appeal from the initial summary judgment in this action, we agreed with the conclusion that the title insurance policy and Indemnity Agreement constitute a single contract. (Mayer v. Transamerica*** *Title Ins. Co.* (Jan. 28, 2000, B123556) [nonpub. opn.] at pp. 13-15, 120 Cal.Rptr.2d 535.) We also concluded, however, that there were triable issues of fact as to whether the Cases Agreement was intended to substitute for and extinguish all of the parties' obligations under the policy and Indemnity Agreement or only the obligations concerning payment of attorney fees and costs. (*Id.* at pp. 16- 18, 120 Cal.Rptr.2d 535.) In reversing the summary judgment, we noted several unanswered questions regarding the parties' rights and liabilities under the various contracts and acknowledged that some of those issues were not then before us. (*Id.* at pp. 23-24, 120 Cal.Rptr.2d 535.)

12. *Transamerica's Subsequent Summary Judgment Motion*

Transamerica moved for summary judgment or summary adjudication on the supplemental complaint in June 2000. The superior court determined that the complaint was unintelligible and ordered the Mayers to file a fourth amended complaint specifying each alleged breach and the contract on which each count is based. The court denied the summary judgment motion without prejudice to a renewed motion after filing of the fourth amended complaint.

13. *The Fourth Amended Complaint*

The **Mayers** filed a fourth amended complaint against **Transamerica** in September 2000. The complaint also names HBA, each of HBA's original general and limited partners other than the Mayers, and HBM as "nominal defendants."

The fourth amended complaint alleges counts against **Transamerica** for (1) breach of the title insurance policy by failing to provide the **Mayers** with counsel to defend the *Driver* case and prosecute the *Driver* cross-complaint and malpractice action, and by failing to "clear title"; (2) breach of the Cases Agreement by refusing to pay attorney fees and costs reasonably necessary to defend the *Driver* case and prosecute on the **Mayers'** behalf the cross-complaint against C.W. Driver and the malpractice action, and by "purchasing" and seeking to enforce the *Driver* judgment against Joseph **Mayer;** (3) breach of the implied duty of good faith and fair dealing arising from the policy, the Cases Agreement, and alleged oral and written agreements to provide the **Mayers** with counsel as a courtesy to defend the *Driver* case and prosecute the *Driver* cross-complaint and malpractice action, by among other things failing to provide counsel to represent the **Mayers** in those actions, failing to defend, prosecute, and settle those actions in a manner advantageous to the **Mayers,** and failing to satisfy the *Driver* judgment; (4) fraud relating to the alleged promises to provide the **Mayers** with counsel to defend and prosecute the actions; (5) intentional interference with economic relations relating to **Transamerica's** counsel's alleged disrupting of a potential settlement between the **Mayers** and C.W. Driver; and (6) negligence and constructive fraud in acting as an escrow agent in connection with loans to HBA.

*6 The fourth amended complaint also alleges that the Cases Agreement was intended to be a novation of the Indemnity Agreement, that **Transamerica** entered into the Cases Agreement to provide a means to recover the amount that it would become obligated to pay for the *Driver* judgment because it believed that the indemnitors were unable to pay the indemnity under the Indemnity Agreement, and that **Transamerica** as early as March 1992 accepted the **Mayers'** defense in the *Driver* case without a reservation of rights.

14. *Demurrer to the Fourth Amended Complaint*

Transamerica demurred to the fourth amended complaint in September 2000 on several grounds, including that the **Mayers** are not insureds and therefore have no standing to sue **Transamerica** for breach of the title insurance policy, they failed to serve the complaint on indispensable parties, the complaint does not allege fraud with particularity, and the complaint does not allege facts sufficient to state a cause of action for intentional interference with prospective economic advantage.

The **Mayers** argued in opposition that as partners in HBA and assignees under the Assignment and because **Transamerica** provided them a "courtesy defense" the **Mayers** are insureds with standing to sue **Transamerica** for breach of the policy, the "nominal defendants" are not indispensable parties and do not meet the requirements for compulsory joinder, and the complaint adequately alleges fraud and intentional interference with prospective economic advantage.

The superior court sustained the demurrer to the first, fourth, fifth, and sixth counts of the fourth amended complaint without leave to amend on October 30, 2000, and ruled that the second and third

counts were viable only as to allegations that **Transamerica** breached duties owed to the **Mayers** arising from the Cases Agreement by failing to provide the **Mayers** with separate counsel to prosecute the malpractice action and by acquiring the *Driver* judgment. The court concluded that the Mayers have no standing to sue for injury to HBA, and "Cases agreement cannot be sought without joinder of the other parties."

15. *The Renewed Summary Judgment Motion*

Transamerica renewed its prior motion for summary judgment or summary adjudication on October 17, 2000, before the ruling on the demurrer. The motion addressed all six counts and argued that (1) the complaint must be dismissed due to the **Mayers'** failure to serve the complaint on indispensable parties; (2) the supplemental complaint alleges that this action is one of the "successor and replacement actions and suits" referenced in the Assignment, the Assignment states that HBA and its original partners irrevocably appoint HBM as their attorney-in-fact in connection with the *Driver* case "and all successor and replacement actions and suits," HBM therefore has exclusive control of this action and is an indispensable party, HBM through its attorney asserted that this action has no merit and vowed to seek a dismissal of the complaint if the indispensable parties were served, and the **Mayers** did not serve the indispensable parties for that reason; (3) **Transamerica** owed no duty to the **Mayers** under the policy or the Cases Agreement; (4) the **Mayers'** courtesy defense was expressly limited to defense of the mechanic's lien claim and did not extend to the **Mayers'** liability under the guaranty, and in any event **Transamerica** was entitled to discontinue the courtesy defense when it became clear that C.W. Driver would prevail, and providing a courtesy defense did not create a duty to

indemnify; (5) **Transamerica's** alleged failure to provide counsel to prosecute on the **Mayers'** behalf the cross-complaint in the *Driver* case and the malpractice action caused no damage to the **Mayers** because they had no standing to sue as individuals; and (6) **Transamerica's** acquisition of the *Driver* judgment was proper because HBA consented to the assignment, and Joseph **Mayer** is personally liable to C.W. Driver on the judgment based on his personal guaranty.

7** The **Mayers** argued in opposition that (1) our opinion in ***Mayer *v.* ***Transamerica*** *Title Ins. Co., supra,* B123556 established that there are triable issues of fact, and the opinion is law of the case; (2) the unserved "nominal defendants" are not indispensable parties and could have intervened in the action but failed to do so; (3) under the terms of the Assignment the **Mayers** did not assign their individual rights to sue **Transamerica;** (4) the **Mayers** are insured under the policy as partners "for their acts done in the usual course of partnership business," and the judgment against Joseph **Mayer** in the *Driver* case is based on his liability as a partner rather than his personal guaranty; (5) **Transamerica** defended HBA and the general partners in the *Driver* case without a reservation of rights and therefore waived the right to contest coverage; (6) **Transamerica** provided the **Mayers** a courtesy defense in the *Driver* case, owed them a duty of good faith and fair dealing in providing the defense, and breached its duty by attempting to enforce the *Driver* judgment against its own insureds; (7) **Transamerica** owed a duty to the **Mayers** under the policy and the Cases Agreement to represent them as partners in the malpractice action, and also represented them as a courtesy in the malpractice action, and owed them a duty of good faith and fair dealing in that representation; and (8) the **Mayers** suffered damages apart from the costs to

prosecute their purported individual claims in the cross-complaint against C.W. Driver and the malpractice action, including amounts that the **Mayers** contributed to their own defense in the *Driver* case and financial losses caused by **Transamerica's** "refusal to pay for the partnership's litigation in the Driver action."

16. *Motion for Reconsideration and Proposed Fifth Amended Complaint*

The Mayers moved for reconsideration of the demurrer ruling in November 2000, before the hearing on the summary judgment motion. They submitted a proposed fifth amended complaint and argued that it alleges facts that establish their standing to sue Transamerica.

The proposed fifth amended complaint alleges counts against Transamerica for breach of the title insurance policy, breach ofthe Cases Agreement, breach of the implied covenant of good faith and fair dealing arising from those two contracts and from providing a courtesy defense, and intentional interference with economic relations.

Transamerica opposed the motion for reconsideration on the grounds that the **Mayers** presented no new or different facts, circumstances, or law and presented no satisfactory explanation for failing to allege the purportedly new matters earlier.

17. *Summary Judgment and Denial of the Motion for Reconsideration*

The superior court granted Transamerica's motion for summary adjudication on December 4, 2000. The 27-page ruling addresses all six counts alleged in the complaint, despite the earlier sustaining of the

demurrer to several counts. The court decided among other things that (1) the question is not whether the **Mayers** failed to join indispensable parties, but whether the **Mayers** have standing to sue **Transamerica** for the alleged conduct; (2) only HBA is an insured under the policy, so the **Mayers** have no standing to sue **Transamerica** for breach of the policy because they are not insureds; (3) ***Mayer*** *v. Allen, Matkins, supra,* B110341 determined that the **Mayers** had no individual interests and no standing in the malpractice action and that only HBM had the authority to control the prosecution of that action, so the **Mayers** had no right to separate counsel in the malpractice action; (4) **Transamerica** had no duty under the policy or the Cases Agreement to provide counsel to prosecute the cross- complaint against C.W. Driver; (5) **Transamerica** owed no duty to the **Mayers** under the Cases Agreement because *C.W. Driver v.* ***Mayer,*** *supra,* G015658 and G016940 and ***Mayer*** *v. Allen, Matkins, supra,* B110341 determined that pursuant to the Assignment and Representation Agreement the **Mayers** had no authority to pursue litigation in either the *Driver* case or the malpractice action; (6) the two-year statute of limitations for breach of an oral agreement bars any cause of action based on an alleged oral agreement to provide a courtesy defense in the *Driver* case, and the complaint does not adequately allege a written agreement to provide a courtesy defense or allege in what manner **Transamerica** failed to represent the **Mayers'** purported interests in the *Driver* case; (7) the superior court in the *Driver* case approved the settlement of that action including the assignment of judgment to **Transamerica,** and *C.W. Driver v.* ***Mayer,*** *supra,* G015658 and G016940 affirmed, so the **Mayers** are bound by the settlement and have no cause of action against **Transamerica** for "purchasing" the *Driver* judgment; (8) Joseph **Mayer's** liability under the *Driver* judgment is based in part on the guaranty, and

the policy does not cover his liability on the guaranty, so **Transamerica** can acquire the judgment against him; (9) the fraud count is not alleged with sufficient specificity to state a cause of action, and to the extent that it incorporates other allegations in the complaint the count also fails for the reasons previously stated; (10) the counts for intentional interference with prospective economic advantage and negligence and constructive fraud fail for the reasons stated at the hearing on the demurrer and for additional reasons stated in the summary judgment ruling; and (11) the holding in ***Mayer*** *v.* ***Transamerica,*** *supra,* B123556 was limited to the conclusion that there were triable issues of fact as to whether the Cases Agreement extinguished the parties' rights and obligations under the policy and the Indemnity Agreement, and that holding does not affect the present summary judgment ruling.

***8** The court also decried the Mayers' failure to address the effect of the prior appellate rulings, the Assignment, and the Representation Agreement on their purported claims in this action and their "tendency to relate a great deal of unnecessary and redundant material while leaving out facts essential to properly pleading various causes of action."

The court stated that it could not grant summary judgment because Transamerica's cross-complaint was still pending, but stated that it would enter a summary judgment if Transamerica dismissed the cross-complaint. **Transamerica** dismissed the cross-complaint after the denial of the **Mayers'** motion for reconsideration.

The superior court denied the Mayers' motion for reconsideration of the demurrer ruling on December 14, 2000. The court stated that **Transamerica's** obligations under the title insurance policy to defend

and indemnify the mechanic's lien claim were illusory because Joseph **Mayer** agreed to assume those same obligations in the Indemnity Agreement. The **Mayers'** counsel responded that the Indemnity Agreement "could never alter the fundamental agreement as insured and insurer that **Mayer** had with **Transamerica."** The court also stated that appellate courts in this action and related actions had determined that only HBM could make decisions for HBA in the malpractice action and that the malpractice settlement was proper. The court concluded that the fifth amended complaint does not allege a valid cause of action.

The court entered judgment in favor of Transamerica in December 2000. The Mayers appealed the judgment.

18. *Attorney Fees Motion*

Transamerica moved for an attorney fee award in January 2001 based on an attorney fee provision in the Cases Agreement. The superior court granted the motion in February 2001 and awarded $370,000 in attorney fees. The Mayers appealed the order awarding attorney fees. We consolidated the two appeals.

19. *Appeal in Mayer v. Driver*

Division Four of the Second District Court of Appeal recently affirmed the judgment in *Mayer v. Driver.* The Court of Appeal concluded that the action was not a successor or replacement of the *Driver* case, so the Assignment did not confer standing on the Mayers to prosecute the action. It also concluded that the Mayers as partners had no standing to maintain an action for injury to property owned by the partnership. (*Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 120 Cal.Rptr.2d 535.)

CONTENTIONS

The primary emphasis of the **Mayers'** contentions on appeal is that the **Mayers** are insureds both under the policy and because **Transamerica** provided them a "courtesy defense" in the *Driver* case, so they have standing to sue **Transamerica.** In their opening brief, the **Mayers** do not explain what they have standing to sue **Transamerica** for, that is they do not attempt to explain the various allegations in the complaint or even identify the counts alleged, but merely refer to the complaint as an "insurance-based action" and "insurance bad faith case" and argue that they have standing to maintain such an action because they are insureds. The opening brief also does not address the superior court's conclusion that some of the duties alleged to arise from the policy and the Cases Agreement do not arise as a matter of law, which is separate and apart from the question whether the Mayers have standing to sue for breach of those duties. While the Mayers contend our opinion reversing the prior summary judgment is law of the case, they do not address the superior court's conclusion that prior appellate opinions are collateral estoppel against the Mayers in this case.

***9** The **Mayers** contend (1) our opinion reversing the prior summary judgment in favor of **Transamerica** stated that there were triable issues of fact and unanswered factual questions concerning the **Mayers'** standing to sue **Transamerica,** that opinion is law of the case, and those triable issues still exist; (2) the **Mayers** are insureds because they are partners in HBA, the named insured, and therefore have standing to sue **Transamerica;** (3) **Transamerica** waived the right to contest coverage by defending the **Mayers** in the *Driver* case without a reservation of rights; (4) even if the **Mayers** are not insureds under the policy, **Transamerica** assumed a duty to defend by providing

the **Mayers** a "courtesy defense" in the *Driver* case and owed a duty of good faith and fair dealing in providing the defense; (5) the "nominal defendants" are not indispensable parties because complete relief can be granted in their absence and they have not claimed an interest in this action; (6) the proposed fifth amended complaint alleges that the **Mayers** are insureds and therefore adequately alleges a basis for standing, and the trial court erred in denying reconsideration of the sustaining of the demurrer to the fourth amended complaint without leave to amend; and (7) **Transamerica** failed to move for an attorney fee award after the prior summary judgment and therefore cannot recover fees incurred before the date of our prior appellate opinion.

Transamerica contends (1) the present summary judgment is based on grounds different from those of the prior summary judgment, so our prior opinion in this case is not law of the case; (2) the **Mayers** are not insured under the policy as individuals, and Joseph **Mayer's** liability under the *Driver* judgment is based on his personal guaranty, which is not covered under the policy, rather than on his status as general partner; (3) the **Mayers** had no reasonable expectation of coverage under the policy because Joseph **Mayer** agreed to indemnify **Transamerica** for the coverage provided; (4) **Transamerica's** alleged refusal to defend the **Mayers** in the *Driver* case caused no damage because *C.W. Driver v.* ***Mayer,*** *supra,* G015658 and G016940 determined that the potential defenses to liability were waived when they were not asserted in the arbitration, which occurred before the **Mayers** tendered their defense to **Transamerica;** (5) **Transamerica** had no obligation under the policy or the Cases Agreement to prosecute the cross-complaint against C.W. Driver or to do so on the **Mayers'** behalf; (6) the "courtesy defense" provided to Joseph **Mayer** was expressly limited in scope, **Transamerica** did not

assume the broad duties that the **Mayers** allege and had no obligation to continue providing a defense, and providing a defense did not create a duty to indemnify Joseph **Mayer's** liability under the *Driver* judgment; (7) the parties agreed under the terms of the Cases Agreement that by providing a defense **Transamerica** did not admit liability under the policy and therefore did not waive its defenses to coverage; (8) **Transamerica's** duty to pay attorney fees and costs to "defeat the mechanic's lien claim of Driver against HBA," as stated in the Cases Agreement, was a duty owed to HBA and not to the **Mayers, Transamerica** had the exclusive right under the agreement to determine the amount reasonable and necessary to fund the defense, and it was reasonable to settle the *Driver* case after the Court of Appeal reversed the order vacating the arbitration award and determined that the defenses to the mechanic's lien claim were waived because they were not asserted in the arbitration; (9) **Transamerica** had the exclusive right under the Cases Agreement to determine the amount of attorney fees and costs "which in its sole opinion are reasonable and necessary for HBA and related individuals and entities to prevail" in the malpractice action, as stated in the Cases Agreement, **Transamerica** fulfilled its obligation and achieved a $4.75 million settlement, and ***Mayer*** *v. Allen, Matkins, supra,* B110341 determined that the **Mayers** had no individual interests in that action and no standing to pursue additional claims against the attorneys; (10) **Transamerica** had no obligation under the policy to defend the **Mayers** because the **Mayers** were not insureds, and in any event the **Mayers** had no potential to sustain a covered loss because they had no title to the real property and therefore were not entitled to a defense under the policy; (11) **Transamerica's** "purchase" of the *Driver* judgment was proper because HBA consented to the purchase, and Joseph **Mayer's** liability under the judgment is

based on his personal guaranty, which **Transamerica** has no obligation to indemnify; (12) **Transamerica** had no obligation under the policy to prosecute the malpractice action or to do so on the **Mayers'** behalf; (13) the **Mayers** suffered no damage from the alleged refusal to prosecute the cross-complaint against C.W. Driver on their behalf because the superior court in the *Driver* case determined that their claims had no merit and *C.W. Driver v.* ***Mayer,*** *supra,* G015658 and G016940 affirmed; (14) the **Mayers** suffered no damage from the alleged refusal to prosecute the malpractice action on their behalf because ***Mayer*** *v. Allen, Matkins, supra,* B110341 determined that the **Mayers** had no individual interests in that action and no standing; (15) the **Mayers'** failure to serve indispensable parties, including HBA and several partners who were dismissed as defendants because they had not been served, is an alternative ground for summary judgment; (16) HBM has the sole right to control this action as one of the "successor and replacement actions or suits" pursuant to the irrevocable power of attorney granted in the Assignment; and (17) the decision by the superior court in the *Driver* case that the **Mayers** were bound by the appointment of HBM as their attorney-in-fact under the terms of the Assignment is collateral estoppel and conclusively establishes that the **Mayers** have no right to control this action; (18) the **Mayers** presented no new or different facts, circumstances, or law to justify reconsideration of the sustaining of the demurrer without leave to amend, they provided no satisfactory explanation for their failure to allege the purportedly new matters earlier, and in any event the fifth amended complaint fails to state a valid cause of action for the same reasons stated above, so denial of the motion for reconsideration was proper; and (19) the prior summary judgment was reversed on appeal and is no effect, **Transamerica** timely moved for an attorney fee award after the present summary

judgment, and there is no authority to support the **Mayers'** argument that by failing to move for a fee award after the prior summary judgment **Transamerica** waived the right to recover those fees.

***10** The Mayers elaborate on the allegations of the complaint in their reply brief in an attempt to explain why they are the "victims" in this case. They argue that **Transamerica** (1) had a duty under the policy to defend the *Driver* case and breached that duty by failing to defend Joseph **Mayer** as a general partner and Eleanor **Mayer** as a limited partner, "failing to clear the title as promised in the policy," and "failing to provide a full legal defense"; (2) had duties under the policy to provide counsel to prosecute the cross-complaint against C.W. Driver and the malpractice action and breached those duties by "failing to provide full legal counsel"; (3) had a duty under the Cases Agreement to pay attorney fees and costs to defend against the mechanic's lien claim in the *Driver* case and breached that duty by refusing to pay fees and costs that were reasonably necessary and by purchasing the *Driver* judgment and demanding payment only from the **Mayers;** (4) had duties under the Cases Agreement to pay attorney fees and costs to prosecute the cross-complaint against C.W. Driver and the malpractice action and breached those duties by refusing to pay fees and costs that were reasonably necessary; (5) breached the duty of good faith and fair dealing in 16 specified ways; (6) defrauded the **Mayers** by selling them an insurance policy, promising coverage, and then failing to comply with its obligations under the policy, and by making false promises under the Cases Agreement and false promises that it would provide a courtesy defense; and (7) intentionally disrupted a potential settlement between the **Mayers** and C.W. Driver. The **Mayers** also contend (8) they have standing to sue **Transamerica** because they sustained injury in fact as a result of

Transamerica's described conduct; and (9) the *Driver* judgment against Joseph **Mayer** is based solely on his status as a "general partner and owner" rather than on his personal guaranty.

DISCUSSION

1. *Law of the Case*

The law of the case doctrine holds that when an appellate opinion states a principle or rule of law necessary to the decision, the principle or rule of law is binding on a lower court hearing the same case and an appellate court in a subsequent appeal ordinarily will follow that principle or rule of law. (*Clemente v. State of California* (1985) 40 Cal.3d 202, 211-212, 219 Cal.Rptr. 445, 707 P.2d 818.)

[1] The superior court granted the prior summary judgment based on its conclusions that **Transamerica** owed no duty to the **Mayers** under the title insurance policy or the Indemnity Agreement because the Cases Agreement extinguished the parties' rights and obligations under those contracts, and that **Transamerica** did not breach its duties under the Cases Agreement. We reversed based on our conclusion that there were triable issues of fact as to whether the parties intended the Cases Agreement to be a novation of the policy and Indemnity Agreement. (***Mayer*** *v.* ***Transamerica*** *Title Ins. Co., supra,* B123556 at pp. 12, 15-22.) We did not decide whether **Transamerica** owed the **Mayers** the alleged duties under the policy on which their complaint is based or whether there was a triable issue of fact as to **Transamerica's** alleged breaches of duties owed to the **Mayers** under the Cases Agreement. We also did not decide whether issues conclusively determined in the related actions precluded the Mayers' claims in this action.

***11** The present appeal presents issues that we did not decide in the prior appeal, including whether **Transamerica** owed the **Mayers** the alleged duties under the policy and the Cases Agreement on which their complaint is based and whether issues conclusively determined in the related actions preclude the **Mayers'** claims in this action. The prior opinion is not law of the case on those issues and therefore does not govern this appeal.

2. *Prejudicial Error*

As explained *ante,* this case involves a series of agreements between various parties, several related actions in which the Mayers were parties involving common, related, and interdependent issues, and prior appellate opinions in the various actions. In light of this interrelationship and interdependence, appellate opinions in this action and the related actions have cited the prior appellate opinions and have relied on matters conclusively established in those prior opinions, as discussed *ante.* An understanding of those matters is necessary to understand the issues presented in this appeal.

The similarities between the allegations in this case and matters adjudicated in the related actions are readily apparent. Those similarities include the Mayers' assertion of individual rights in the *Driver* case and the malpractice action apart from the rights of HBA, their assertion of those individual rights despite both the Representation Agreement and the power of attorney granted to HBM in the Assignment, and their attack on the settlements in both the *Driver* case and the malpractice action. Yet the Mayers completely disregard the matters adjudicated in the related actions in the present appeal.

The demurrer and summary judgment rulings that the Mayers now challenge are based in large part on

the collateral estoppel effect of issues decided against the Mayers in prior appellate opinions and determinations by the superior court in the *Driver* case that were affirmed on appeal and therefore are final. The Mayers neither explain the effect of those prior decisions nor challenge the superior court's conclusion in its exhaustive summary judgment ruling that those issues conclusively determined against the Mayers in this action and related actions preclude the claims alleged in the fourth amended complaint.

Moreover, in their opening brief the Mayers avoid discussing the particular claims alleged in the fourth amended complaint, which tends to conceal a certain dissonance between those claims and prior decisions adverse to the Mayers. The Mayers' reply brief is more comprehensive in its identification of particular claims alleged in the fourth amended complaint. Although the reply brief argues many factual details and repeats many allegations of the complaint, it provides very little legal argument or reasoning as to why **Transamerica** owed the **Mayers** the particular duties on which their claims are based and fails to discuss how the prior appellate opinions affect those claims.

***12** An appellant has the burden to demonstrate both that the trial court erred and that the error was prejudicial resulting in a miscarriage of justice. (Cal. Const., art VI, § 13; Code Civ. Proc., § 475; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069, 232 Cal.Rptr. 528, 728 P.2d 1163.) An error is not prejudicial if independent grounds unaffected by the error support the judgment. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19, 112 Cal.Rptr. 786, 520 P.2d 10; *Estate of Beard* (1999) 71 Cal.App.4th 753, 776-777, 84 Cal.Rptr.2d 276.) To demonstrate prejudicial error, therefore, an appellant must show that none of the grounds on which the judgment is based support the judgment.

[2] We will not review the numerous grounds for the superior court's rulings that the Mayers do not address on appeal, such as the collateral estoppel effect on the various claims in this action of decisions in related actions and the effect of the Representation Agreement and Assignment on the Mayers' claims in this action, to determine whether those grounds independently support the judgment. It was the Mayers' responsibility in the first instance to show that those grounds do not support the judgment as necessary to demonstrate that any error was prejudicial. "[O]ur duty to examine the entire cause arises when and only when the appellant has fulfilled his duty to tender a proper prejudice argument. Because of the need to consider the particulars of the given case, rather than the type of error, the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice. [Citations.]" (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106, 87 Cal.Rptr.2d 754; accord, *In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337, 98 Cal.Rptr.2d 136.) Since the Mayers have failed to do so, we conclude that they have not shown prejudicial error.

3. *Attorney Fees*

[3] Transamerica moved for an attorney fee award within 60 days after service of a notice of entry of judgment in December 2000, as required by rule 870.2(b)(1) of the California Rules of Court. The motion was timely. We reject the **Mayers'** unsupported argument that **Transamerica** waived the right to recover attorney fees incurred before the prior judgment by failing to move for attorney fees at that time. The failure to move for attorney fees would have prevented Transamerica from recovering fees only if we had affirmed that judgment. Since we reversed the judgment, it is of no effect. (*Weisenburg v. Cragholm* (1971) 5 Cal.3d 892, 896, 97 Cal.Rptr. 862, 489 P.2d

1126 ["When that judgment was unqualifiedly reversed, however, the effect was the same as if it had never been entered, except that on a retrial the opinion of the Court of Appeal must be followed as far as applicable. [Citations.]"]; *Barnes v. Litton Systems, Inc.* (1994) 28 Cal.App.4th 681, 683-684, 33 Cal.Rptr.2d 562.) Transamerica timely moved for attorney fees after the judgment of December 2000 and therefore is entitled to recover its reasonable attorney fees incurred in this action without limitation.

DISPOSITION

***13** The judgment is affirmed. Transamerica is entitled to costs on appeal.

We concur: KLEIN, P.J., and CROSKEY, J.

APPENDIX B

FILED
LOS ANGELES SUPERIOR COURT
DEC 21 2000
JOHN A. CLARK, CLERK
/S/_____
BY B.M. BAKER, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOSEPH P. MAYER, III and ELEANOR MAYER,	) CASE NO. BC 107066
Plaintiffs,	) FINAL JUDGMENT
vs.	)
TRANSAMERICA TITLE INSURANCE COMPANY, now known as TRANSNATION TITLE INSURANCE COMPANY, and DOES 2 through 50 Inclusive as Defendants;, et al.,	) Honorable Barbara A. Meiers
Defendants.	)
AND RELATED CROSS-ACTION.	)

The motion for summary judgment or, in the alternative for summary adjudication, of defendants Transmerica Title Insurance Company and Comonwealth Land Title Insurance Company, now known as Transnation Title Insurance Company (collectively referred to as "defendants"), came on regularly for hearing on November 27, 2000 before

this court in Department 12, the Honorable Barbara A. Meiers presiding.

The court having thereafter entered an order granting defendants' motion for summary judgment; and

Defendants having dismissed without prejudice the cross-complaint for indemnification in reliance on the court's summary adjudication ruling,

NOW THEREFORE, it is hereby ordered, adjudged and decreed, that plaintiffs shall take nothing by their Fourth Amended Complaint or by any other operative complaint filed by plaintiffs herein, that judgment be entered in favor of defendants and against plaintiffs on said complaints, and that defendants are adjudged to be the prevailing parties in the above action, and are awarded their costs of suit against plaintiffs and each of them in accordance with a cost bill to be filed by defendants herein in the amount of $_____.

Dated: Dec 21 2000

By: /s/ _____
JUDGE OF THE SUPERIOR COURT

APPENDIX C

Court of Appeal, Second Appellate District, Division Three – No. B147731
S109410

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JOSEPH P. MAYER et al., Plaintiffs and Appellants,

v.

TRANSNATION TITLE INSURANCE COMPANY, Defendant and Respondent.

Petition for review DENIED.

SUPREME COURT
F I L E D
OCT 16 2002
Frederick K. Ohlrich Clerk

DEPUTY

GEORGE

Chief Justice